Supreme Court, U.S.
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No. 93-828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

REVEREND ROBERT PEARSON, ET AL.,

Petitioners,

—v.—

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Questions Presented

I. Whether on remand from this Court the Court of Appeals for the Second Circuit correctly reinstated its opinion, finding that applications for further relief from that judgment should be made to the District Court.

II. Whether Petitioners are barred in these collateral proceedings from relitigating the merits of the underlying injunction which is part of a final judgment in prior litigation.

List of Parties

Respondents accept Petitioners' list of the parties. In accordance with Rule 28.1 of the Rules of this Court, Respondents report that Eastern Women's Center, Inc., Planned Parenthood of New York City, Inc., New York State National Abortion Rights Action League ("NARAL"), Inc., Religious Coalition for Abortion Rights - New York Metropolitan Area, and the National Organization for Women are corporations. None of them have parent or subsidiary companies, but New York State NARAL, Inc. is affiliated with the National Abortion Rights Action League, Inc. and Planned Parenthood of New York City, Inc. is affiliated with Planned Parenthood Federation of America, Inc.

Counter Statement of the Case

Petitioners' statement of the case contains numerous misstatements of fact and law and Respondents do not adopt it.

Petitioners are eight individuals and two organizations who were held in contempt for knowingly violating one or more injunctive orders, including a permanent injunction (collectively, the "injunction"), issued by the United States District Court for the Southern District of New York. The injunction prohibits Petitioners from blocking access to women's health clinics where abortions are performed in New York City and in Westchester, Suffolk and Nassau counties in New York State.

The injunction was incorporated in a final judgment entered by the District Court in 1989. The injunction provides for prospective sanctions (including attorney's fees) for violations of its terms. The District Court's final judgment and the injunction were unanimously affirmed by the United States Court of Appeals for the Second Circuit in 1989. A petition to this Court for a writ of certiorari was denied in 1990. That action, denominated "Terry I," is reported as New York State Nat'l Org. for Women v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988) and id., 704 F. Supp. 1247 (S.D.N.Y.), appeals consolidated and aff'd as modified, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990).

The petition for certiorari now before the Court is from collateral proceedings brought by plaintiffs (collectively, "N.O.W.") for contempt sanctions (including attorney's fees) for violating the injunction, and for prevailing party attorney's fees under 42 U.S.C. § 1988. These proceedings, denominated "Terry II," are reported at 732

F. Supp. 388 and 737 F. Supp. 1350 (S.D.N.Y. 1990), appeals consolidated and aff'd, 961 F.2d 390 (2d Cir. 1992), cert. granted, judgment vacated, and remanded for reconsideration in light of Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993), and reinstating judgment on remand, 996 F.2d 1351 (2d Cir. 1993). The present Petitioners include three of the named defendants in Terry I (Operation Rescue, Terry, and Herlihy), and seven non-party contemnors found to have violated the injunction in concert with the named defendants.

The petition seeks review of an order of the Court of Appeals reinstating its initial judgment pursuant to its prior opinion and holding that "[a]pplications for such relief in light of Bray[v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993),] as dismissal of the federal claims, a remand of the action to state court, or reconsideration of the contempt sanctions litigated on this appeal should be addressed in the first instance to the district court." Petition App. at A-3, A-6. As described below, each of the questions raised by Petitioners was fully litigated and finally determined in Terry I. Respondents contend that these issues may not be relitigated in collateral proceedings, that the actions of the Court of Appeals on remand were correct and, therefore, that the petition should be denied.

TERRY I

Plaintiffs initially brought this action in state court.[1]

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[1] The complaint (and the amended complaint) states seven state law causes of action and one federal claim under 42 U.S.C. § 1985(3). Respondent's App. at A-13, A-30.

Defendants removed to the United States District Court for the Southern District of New York on May 3, 1988, after the state court judge had issued two temporary restraining orders in response to defendants' demonstrations blocking access to certain women's health clinics. Petition App. at A-96. The second of the state court orders, issued on May 2, 1988, enjoined defendants from "trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester Counties." Id. at A-95-A-96. On May 3, 1988, the same day that defendants removed the action to federal court, defendants Terry and Operation Rescue violated the order by blocking access to an abortion clinic. Id. at A-96.

As a result of Terry's and Operation Rescue's complete disregard for the state court's temporary restraining order, the District Court decided on May 4, 1988, to continue and adopt that order, but modified it to add coercive sanctions of $25,000 for each subsequent daily violation.[2] Terry I, 697 F. Supp. at 1330; Petition App. at A-96. The contempt continued on May 5 and 6, when Operation Rescue once again blocked access to medical facilities in Long Island and New York City, respectively. 697 F. Supp. at 1331. Thereafter, plaintiffs moved for civil contempt sanctions against Terry and Operation Rescue for violating the District Court's injunction.

Neither Terry nor Operation Rescue challenged any facts relating to the contempt. Terry's and Operation

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[2] The state court order was also modified to require defendants to notify plaintiff-intervenor New York City in advance of any demonstrations.

Rescue's opposition to the contempt motion included the same legal argument they seek to raise in this collateral proceeding: they argued that contempt fines assessed after the completion of acts violating a "prohibitory" injunction are by definition criminal penalties because the contumacious acts cannot be undone or "purged." Id. at 1329-30. Defendants maintained that because the fines were criminal penalties, they could not be imposed without affording the accused contemnors such rights as a jury trial prosecuted by the U.S. Attorney's office and the benefit of the criminal law standard of proof.

The District Court considered and rejected this argument, and imposed $50,000 in civil contempt fines jointly and severally against Terry and Operation Rescue to be paid to plaintiffs.[3] The court ruled that the prospective civil contempt sanctions were designed to enforce a court order and that defendants had been given ample opportunity to avoid the fines by complying with that order. Id. On the same day, October 27, 1988, the District Court converted the temporary restraining order into a preliminary injunction.

On January 10, 1989, the court granted summary judgment to plaintiffs on their § 1985(3) and state law nuisance and trespass claims, and entered a permanent injunction. Terry I, 704 F. Supp. 1247 (S.D.N.Y. 1989). In opposition to plaintiffs' summary judgment motion, the defendants unsuccessfully raised another argument they now

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[3] The court also assessed $19,141.00 for costs payable to the City resulting from defendants' failure to provide advance notification of the location of the demonstrations. Petition App. at A-98.

seek to bring before this Court: that N.O.W.'s federal claim did not state a cause of action under 42 U.S.C. § 1985(3). Id. at 1258-60.

The Court of Appeals consolidated defendants' appeals from the summary judgment order and the contempt order, and unanimously upheld both.[4] Terry I, 886 F.2d 1329. The Court of Appeals held that "[t]he prospectively fixed penalties were plainly intended to coerce compliance with the Court's order and to preserve the parties' then-existing legal rights" and were therefore civil.[5] Terry I, 886 F.2d at 1350-51 (citation omitted). The appellate court also held that the District Court had properly issued a permanent injunction. Id. at 1362-64. The Court of Appeals further rejected defendants' arguments against the claim based on § 1985(3), and affirmed summary judgment on N.O.W.'s federal and state law causes of action. Id. at 1361-62.

Defendants petitioned this Court for a writ of certiorari, renewing their arguments that the contempt fines were criminal in nature, Respondents' App. at A-55-A-58, and that plaintiffs' complaint failed to state a cause of action under § 1985(3). Id. at 5-11. This Court denied certiorari. 495 U.S. 947.

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[4] These appeals were also consolidated with an appeal of an interlocutory order granting sanctions against defendants for failure to provide discovery. Terry I, 886 F.2d 1345, 1354-57.

[5] The one modification made by the Court of Appeals was to direct that the $50,000 in contempt fines would be payable to the U.S. Treasury instead of to N.O.W.

TERRY II

Plaintiffs initiated these collateral proceedings (Terry II) by moving for contempt for multiple violations of the injunction against defendants Operation Rescue, Terry and Herlihy, and ten non-parties, seven of whom are Petitioners here: Pearson, Lee, Foreman, McMonagle, White, Slattery and Bistate Operation Rescue Network (B.O.R.N.). Of these, only Pearson denied acting with notice of the injunction.[6] The District Court made extensive findings detailing the knowledge each non-party contemnor had of the injunction, the close association that existed between the non-parties and the defendants, and the fact that the non-parties acted in concert with defendants. Petition App. at A-110, A-119-A-134. The District Court concluded and Petitioners no longer dispute that the injunction bound each of them.[7] The Terry II contemnors renewed their challenge to the fines previously litigated and rejected in Terry I, and again contended that the contempt sanctions were criminal because they were being punished for past conduct rather than being coerced into compliance. Petition App. at A-106-A-107, A-111-A-112. They also argued that plaintiffs failed to state a claim under § 1985(3). Applying

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[6] The District Court held hearings before finding Pearson and Slattery in contempt. Petition App. at A-38-A-39 and A-132-A-134.

[7] The District Court made all of the additional findings necessary under Fed. R. Civ. P. 65 to support holding the defendants and non-parties in contempt. Petition App. at A-108-A-134. Petitioners do not raise any of those determinations before this Court.

the holding in Terry I, the District Court rejected both arguments, Petition App. at A-106, and the Terry II contemnors appealed.

After the District Court's decision holding defendants and non-party Petitioners in contempt, N.O.W. moved for attorney's fees against defendants pursuant to 42 U.S.C. § 1988. Plaintiffs also sought attorney's fees from defendants and non-party contemnors for the cost of bringing the contempt motion.

The defendants conceded that N.O.W. was a "prevailing party," but argued that "special circumstances exist which render a fee award in this case unjust." Petition App. at A-64-A-65. The District Court rejected this and other arguments, and awarded prevailing party attorney's fees against defendants, and additional attorney's fees pursuant to the injunction against defendants and non-party contemnors. Defendants and non-party contemnors appealed, and this was consolidated with their earlier appeal of the contempt sanctions.

While this appeal was pending in the Court of Appeals, Petitioners filed a writ of certiorari requesting this Court to review the underlying judgment and injunction "contemporaneously with Bray, or at least [to hold the case] for disposition pending decision in Bray." Respondents' App. A-86. That petition, the first of three filed to date by Petitioners in the Terry II proceedings, was denied on January 21, 1992. Talluto v. Planned Parenthood Margaret Sanger Clinic, 112 S. Ct. 957 (1992).

On April 13, 1992, the Court of Appeals affirmed the District Court's award of attorney's fees under § 1988 and upheld the contempt sanctions against the Petitioners. Petition Appendix D. The appellate court ruled that both

the viability of plaintiffs' federal civil rights claims and the merits of the injunction (including the civil nature of the contempt fines) had been decided in Terry I and relitigation of those issues was foreclosed. Petition App. at A-19-A-20.

The Court of Appeals noted that the Supreme Court was considering Bray at the time the decision in Terry II was rendered, but expressly stated that a reversal in Bray was unlikely to have any effect on the underlying injunction because that injunction was also premised on the separate and independent state grounds of public nuisance and trespass. Id. at A-20-A-22. The appellate court stressed that Petitioners would only benefit from a ruling in Bray that rejected a federal § 1985(3) claim against abortion clinic trespassers if this Court also found that plaintiffs' federal cause of action had been so insubstantial as to deprive federal courts of their pendent jurisdiction over any state law claims. Id. at A-22.[8] In August 1992, the Petitioners filed their second petition for certiorari in Terry II, in which they raised the same challenges to the federal law basis for the underlying injunction and to the imposition of civil contempt sanctions.

This Court decided Bray on January 13, 1993. The Court held that, on the record before it, the respondents in that case had not stated a claim under the deprivation clause of § 1985(3), but the Court expressly held that suits stating the same claim under § 1985(3) brought prior to the decision in Bray were not so "wholly insubstantial and

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[8] Petitioners do not, in fact, contest the District Court's jurisdiction and explicitly reject any suggestion that they seek a remand to state court. Petition at 25 n.14.

frivolous" as to deprive a district court of jurisdiction. Bray, 113 S. Ct. at 768. On February 22, 1993, the Court granted certiorari in Terry II, vacated the judgment below, and remanded the case for further consideration in light of Bray. Petition App. at A-7.

The Court of Appeals requested the parties to submit letter briefs regarding the proper disposition of Terry II upon remand.[9] In a July 2, 1993, per curiam decision, the Court of Appeals reinstated its initial judgment and suggested that Petitioners should address applications for relief such as dismissal of the federal claims, remand to state court, or reconsideration of the contempt sanctions previously litigated to the District Court in the first instance. Petition App. at A-5-A-6. Petitioners moved for a rehearing in banc on July 16, 1993, which the Court of Appeals denied on August 23, 1993.

Ignoring the suggestion of the Court of Appeals, Petitioners now seek review by this Court for a third time, but raise the same challenges to the contempt sanctions and the § 1985(3) claim that the District Court decided adversely to defendants in Terry I. This time Petitioners, in an effort to link their collateral attack on the injunction to a case in which the Court has granted certiorari, copied verbatim the question presented in an unrelated case, International Union, United Mine Workers of America v. Bagwell, No. 92-1625, which was argued on November 29,

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[9] N.O.W. argued in its brief that Bray did not affect the issues before the Court of Appeals in this collateral contempt and fees litigation and, therefore, that any request for relief from the underlying injunction must be directed to the District Court pursuant to Rule 60(b) of the Federal Rules of Procedure.

1993. Petitioners have asked the Court to consider this case with Bagwell, or to hold it pending Bagwell's resolution.

Reasons For Denying The Writ

Petitioners have not presented any "special and important reasons" for granting the writ. S. Ct. R. 10.1. The Court of Appeals' decision reinstating its former mandate is not contrary to this Court's ruling or in conflict with the decision of any other Court of Appeals, and it is fully supported by important public policies of finality.

The petition's fundamental flaw is its failure to acknowledge the collateral nature of this proceeding. This petition for a writ of certiorari represents only the latest of Petitioners' numerous attempts to mount a collateral attack on a final judgment and permanent injunction entered years ago by the District Court in Terry I, affirmed in all relevant respects by the Court of Appeals for the Second Circuit, and for which certiorari was denied by this Court. Terry I is therefore res judicata, and it would undermine long-settled principles of finality for this Court even to consider the questions stated in the petition for writ of certiorari.

Petitioners' argument that the Court of Appeals did not properly apply the rule of Bray on remand is simply misplaced. Bray has no effect on Terry I, because the retroactive effect of new decisions is expressly limited to matters still pending on direct appeal, and does not apply to collateral attacks on final judgments. See Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993). Moreover, there is no occasion for this Court to revisit the well-settled rule that one may not challenge the merits of an injunction by violating it. Because the merits of Terry I can only be reconsidered in the District Court under Rule

60(b), the Court of Appeals properly reinstated its prior judgment and advised Petitioners that any application for further relief should be "addressed in the first instance to the District Court." Petition App. at A-6.

Petitioners have also misrepresented the contempt proceedings below in an attempt to link their case to a currently pending case argued to the Court on November 29, 1993: International Union, United Mine Workers of America v. Bagwell, No. 92-1625. This Court's grant of certiorari in Bagwell is of no benefit to the Petitioners, because the allegedly identical issue -- the distinction between civil and criminal contempt -- was finally decided in Terry I and is not properly before the Court. Because that issue is no longer open on direct appeal, Bagwell can have no effect on these proceedings, regardless of its outcome. As with Terry I's resolution of the § 1985(3) issues, the fact that the Court granted certiorari in a later case on the contempt question does not allow Petitioners to evade the res judicata effect of a final judgment.

I.

The Questions for Which Petitioners Seek Certiorari Were Litigated and Decided In Terry I.

Each of the questions Petitioners seek to bring before this Court was fully litigated and finally determined in Terry I, and Petitioners may not, simply through persistent disobedience of the injunction, circumvent the ordinary rules of finality.

Here, as in Spallone v. United States, 493 U.S. 265, 273 (1990),

> [t]he issue before [the Court] is relatively narrow.

> There can be no question about the liability of [the defendants]: the District Court imposed such liability on [the defendants]; its decision was affirmed in all respects by the Court of Appeals, and we denied certiorari. Nor do we have before us any question as to the District Court's remedial order; the Court of Appeals found that it was within the bounds of proper discretion, . . . and we denied certiorari.

The merits underlying the injunction, the sanctions for violating it, and the question whether plaintiffs were the prevailing parties were all resolved by the District Court in Terry I. The Court of Appeals affirmed and this Court denied certiorari. Since the Petitioners present no other issues that were not already determined in Terry I, there is no issue properly before this Court at this time, and the Court of Appeals was correct to advise Petitioners that their only recourse was in the District Court.

A. The Section 1985(3) Issue Was Decided in Terry I.

In an effort to convince this Court to revisit the merits of Terry I, Petitioners state, incorrectly, that Terry II affirmed "the merits of Respondents' § 1985 claims," Petition at 22, and held that "42 U.S.C. § 1985(3) provides a cause of action for obstructing access to abortion businesses." Id. In fact, these issues were decided in Terry I, see 886 F.2d 1339, 1357-62, and the Court of Appeals in Terry II correctly declined to revisit them. Petition App. at A-19-A-22.

The District Court in Terry I plainly considered Petitioners' question as to whether "§ 1985(3) . . . provide[s] a cause of action against anti-abortion demonstrators for obstructing access to abortion

businesses," Petition at ii, and the Court concluded that it did. 704 F. Supp. at 1258-60. The Court of Appeals considered the same question on appeal, 886 F.2d at 1357-59, and affirmed the District Court's ruling. Petitioners squarely raised this issue as the first question in their petition for certiorari in Terry I, see Respondents' App. at A-47-A-53, and this Court denied the petition. In short, Petitioners had all the opportunity to litigate this issue that the law provides, and they lost at every level.

B. The Civil vs. Criminal Contempt Issue Was Decided in Terry I.

The Court of Appeals correctly held in Terry II that the civil-criminal contempt issue had been adjudicated in Terry I:

> [Appellants] argue that the contempt fines imposed by the district court were criminal, rather than civil, in nature, and that appellants were not accorded procedural protections required in criminal contempt proceedings; we ruled to the contrary in Terry I.

Petition App. at A-20.

That holding is completely supported by the record. When Respondents moved for contempt in response to the violations by Petitioners Terry and Operation Rescue of the May 4, 1988, temporary restraining order, those Petitioners opposed the motion on the same grounds they and the other Petitioners seek to raise here: that prospective contempt fines, assessed after violations of an injunction, constitute criminal penalties that can only be imposed after affording Petitioners the full panoply of due process protections available to criminal defendants. Terry I, 697 F. Supp. at 1329-30. Petitioners renewed this argument in the Court of

Appeals, again without success. Terry I, 886 F.2d at 1350-1351. This Court denied certiorari. 495 U.S. 947. Thereafter, the merits of the injunction were simply no longer open to challenge. See, e.g., Allen v. McCurry, 449 U.S. 90 (1980) (res judicata bars relitigation of any claim between parties where there was previously a judgment on the merits).

II.

Terry I Is Final and May Not Be Attacked on this Appeal from Collateral Proceedings.

The District Court in Terry I granted summary judgment against all defendants on the merits, and that decision is final. The court awarded the substantive relief plaintiffs sought: a permanent injunction (a) prohibiting Petitioners from barring access to facilities performing abortions, (b) prohibiting Petitioners from harassing women seeking to obtain abortions at such facilities, and (c) imposing prospective civil penalties (including attorney's fees) for violations of the injunction. Terry I, 704 F. Supp. at 1264; Respondents' App. at A-30-A-31. The decision left nothing to be decided, except matters of enforcement and other collateral issues, including award of attorney's fees, that might flow from the judgment itself. Therefore, the District Court's decision in Terry I was final in every regard.

Petitioners conceded the finality of the District Court's summary judgment order in their briefs on appeal in Terry I. See Respondents' App. at A-109 (Supplemental Brief for Defendants-Appellants) (District Court's decision on the merits granted "final and permanent relief"). The Court of Appeals' opinion in Terry I further shows that the District Court's summary judgment order was final,

because that judgment brought up on appeal certain interlocutory orders which, by themselves, were "unchallengeable by appeal until final judgment." 886 F.2d at 1350. Indeed, if the judgment had not been final, the Court of Appeals would have had no jurisdiction to review the District Court's earlier interlocutory orders. See Pro-choice Network of Western New York v. Walker, 994 F.2d 989, 994-95 (2d Cir. 1993) (no jurisdiction to review interlocutory civil contempt order), cert. denied sub nom. Syversen v. Summit Women's Ctr., 114 S. Ct. 185 (1993).

This Court's denial of Petitioners' request for a writ of certiorari, 495 U.S. 947, while not a determination on the merits, brought an end to any opportunity for direct review of the District Court's final judgment. As Justice Jackson noted in Brown v. Allen, 344 U.S. 443, 543 (1953) (concurring opinion):

> The fatal sentence that in real life writes finis to many causes cannot in legal theory be a complete blank. . . . [F]or the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata. . . . A civil or criminal judgment usually becomes res judicata in the sense that it is binding and conclusive even if new facts are discovered and even if a new theory of law were thought up . . . .

The res judicata consequences of a final judgment on the merits are not "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). Therefore, neither this Court's decision last year in

Bray nor any decision this Court may make in the Bagwell case can have any effect on the finality of the judgment in Terry I.

The rule of full retroactivity of this Court's decisions applies only to direct appeals, not to collateral proceedings such as this. See Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2517 (1993); James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991). In Harper, this Court held that when the Court applies a rule of federal law to the parties before it, that rule

> must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper, 113 S. Ct. at 2517 (emphasis added).

Petitioners treat Harper as if it referred simply to "all cases" and "all events," Petition at 21, and leave out the crucial phrase that restricts its holding to cases "still open on direct review." That qualifier is, however, critical, and is the reason why Bray has no effect on this case: Harper has no application to a collateral attack on a final judgment such as Petitioners attempt here.

Harper did not purport to make new law, but instead relied on Beam. That reliance highlights the distinction between direct review and collateral attack. In Beam, a majority of the Justices (in four separate opinions, none commanding a majority) endorsed a rule of full retroactivity for all cases then on direct review. At the same time, several members of the Court explicitly noted that the rule of retroactivity stopped short at the bar of res judicata. For example, Justice Souter's opinion in Beam, joined by

Justice Stevens, noted that

> [o]f course, retroactivity in civil cases must be limited by the need for finality, see, Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940); once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed.

Beam, 111 S. Ct. at 2446. Any perceived harshness of this result is counterbalanced by the public interest in the finality of judgments:

> This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties."

Federated Department Stores v. Moitie, 452 U.S. 394, 401 (1981) (quoting Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931)).[10]

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[10] Nothing in the facts or rationale of either Harper or Beam suggests that the rule of full retroactivity is available on collateral attack. On the contrary, Justice Scalia's concurrence in Harper specifically discussed the difference between standards of retroactivity on direct appeal and collateral review. Harper, 113 S. Ct. at 2520-21 (Scalia, J., concurring) (discussing Teague v. Lane, 489 U.S. 288 (1989)). Indeed, Petitioners apparently concede that a final judgment is not vulnerable to collateral attack merely because of a subsequent change in law. See Petition at 21 ("by reinstating its prior judgment, the Court of Appeals has in effect entered a final judgment . . . , thereby

Because Bray has no direct application to a final decision such as Terry I, the decision of the Court of Appeals reinstating its judgment does not conflict with the decision of any other circuit court that applied Bray on a direct appeal. See, e.g., National Abortions Federation v. Operation Rescue, 8 F.3d 680 (9th Cir. 1993) (finding Bray required dismissal of claim under § 1985(3)'s deprivation clause, but not under hindrance clause). For the same reason, the Court of Appeals' decision is not in conflict with subsequent proceedings in Bray. See National Organization for Women v. Operation Rescue, 816 F. Supp. 729 (D.D.C. 1993) (on remand, district court upheld pendent jurisdiction in light of Bray, rejected request to vacate injunction, and held defendants in contempt). Nor does the Court of Appeals' decision conflict with other decisions of the Court of Appeals for the Second Circuit itself. Town of West Hartford v. Operation Rescue, 991 F.2d 1039 (2d Cir. 1993), amply demonstrates that the Court of Appeals for the Second Circuit does apply Bray retroactively to cases still open on direct review. See West Hartford, 991 F.2d at 1045-49. See also Dwares v. City of New York, 985 F.2d 94, 101 (2d Cir. 1993). Consequently, there is no "special and important" reason to grant certiorari in this case. S. Ct. R. 10.1.

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rendering any application to the District Court futile") (emphasis in original). Petitioners fail to acknowledge, however, that it is Terry I that is the final judgment.

III.

The Judgment in Terry I is Res Judicata as to all Petitioners.

Non-party Petitioners Pearson, Lee, Foreman, McMonagle, White, Slattery and B.O.R.N., who were not directly involved in Terry I, do not contend in this Court that Terry I is not res judicata as to them, and any such argument would be futile. Where, as here, the claim being litigated is the same as that decided in the prior litigation and where a close relationship exists between parties and non-parties such that the interests of the non-parties were effectively represented before the court, the resulting judgment is res judicata against both party and non-party.[11] See, e.g., Nevada v. United States, 463 U.S. 110, 129 (1983) (persons in privity with party barred by doctrine of res judicata are similarly barred from relitigating claims); Stone v. Williams, 970 F.2d 1043, 1060 (2d Cir. 1992) (due process does not require matters to be relitigated at behest of one whose legal interests were fairly represented in prior proceeding), cert. denied, 113 S. Ct. 2331 (1993); Expert Electric, Inc. v. Levine, 554 F.2d 1227 (2d Cir.) (individuals are bound by judgments entered against representative association where individuals' interests were advanced by association in earlier litigation), cert. denied, 434 U.S. 903 (1977).

Here, the District Court's extensive factual findings under Rule 65(d) demonstrate the necessary elements of

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[11] In any event, non-party Petitioners may not relitigate the validity of attorney's fees awarded under 42 U.S.C. § 1988, because those fees were only assessed against the defendants. Petition App. at A-87.

privity between party and non-party Petitioners. Cf. Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9, 14 (1945) (Rule 65 is derived from concept of privity). In particular, the District Court detailed the close association between each of the non-party Petitioners and Operation Rescue. The court found that Operation Rescue had called for, coordinated and led all of the demonstrations at which the Petitioners violated the injunction.[12] The court made findings regarding the control Operation Rescue and Randall Terry exercised over the non-parties and the manner in which the non-parties acted in concert with the named defendants to violate the injunction after receiving notice of it.[13] Petition App. at A-110, A-119-A-134.

Nor can there be any argument that the interests of the

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[12] The Court of Appeals had previously found that Operation Rescue "tacitly enrolls members." Terry I, 886 F.2d at 1352.

[13] The close and ongoing association between the parties and non-parties is further underscored by the numerous cases around the country where various combinations of these same Petitioners have participated in similar blockades of abortion clinics coordinated by Operation Rescue and have been named repeatedly as defendants in litigation similar to this. See, e.g., National Abortions Federation v. Operation Rescue, 8 F.3d 680 (9th Cir. 1993); Lucero v. Operation Rescue of Birmingham, 954 F.2d 624 (11th Cir. 1992); Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990); Virginia Nat'l Org. for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), rev'd in part and aff'd in part sub nom. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

non-parties in challenging the legal basis for upholding the civil contempt sanctions were not assiduously represented by the parties' counsel in Terry I. Indeed, all but one of the non-party Petitioners (and all three of the party-Petitioners) were represented in the Court of Appeals by the same counsel who represented defendants Randall Terry and Operation Rescue in Terry I.[14] See Alpert's Newspaper Delivery Inc. v. New York Times Co., 876 F.2d 266, 271 (2d Cir. 1989) (where two groups of litigants used the same attorneys, litigation strategy was centrally coordinated, and the allegations were identical, sufficient identity of parties existed to bar relitigation of previously raised claims).

The Petitioners not parties to Terry I do not seek to challenge the reach of Terry I in their petition, Petition App. at A-24-A-25, and in any event have not established a record that would enable this Court to address this issue. As a result, the decision in Terry I is res judicata as to both party and non-party Petitioners, and all Petitioners are precluded from relitigating the merits of Terry I in this forum.

IV.

This Appeal from Subsequent Enforcement Proceedings Cannot Reopen Issues Determined in Terry I.

The District Court's subsequent award of attorney's fees pursuant to 42 U.S.C. § 1988 and additional contempt

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[14] Petition App. at A-5, A-10. In addition, Terry, Operation Rescue, Herlihy, McMonagle, and White were represented by the same counsel in the District Court. Petition App. at A-56.

sanctions for violation of the permanent injunction in no way impaired the finality of the judgment in Terry I. In White v. New Hampshire Dep't of Employment Security, 455 U.S. 445, 451-52 (1982), this Court "all but held" that "a request for attorney's fees under 42 U.S.C. § 1988" did not prevent the underlying order from being final. Budinich v. Becton Dickenson & Co., 486 U.S. 196, 199-200 (1988). Budinich confirmed that that holding "was based on our conclusion that 'a request for attorney's fees under § 1988 raises legal issues collateral to' and 'separate from' the decision on the merits," id. at 200 (quoting White, 455 U.S. at 451-52), and established "a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final." Id. at 202. See also Osterneck v. Ernst & Whinney, 489 U.S. 169, 174, (1989) (attorney's fee award is uniquely separable from the underlying merits of the controversy). Therefore, Petitioners may not reopen the merits of the judgment in an appeal from the attorney's fee award.

Similarly, violating the injunction does not give Respondents another opportunity to litigate the permanent injunction. "A contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." United States v. Rylander, 460 U.S. 752, 756 (1983) (quoting Maggio v. Zeitz, 333 U.S. 56 (1948)). The reason for this was adamantly stated in Maggio: "The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience." 333 U.S. at 69. Rather, where, as here, an action has resulted in "a final order, it becomes res judicata and is not subject to collateral attack in the contempt proceedings." Id., 333 U.S. at 68.

V.

This Case Should Not be Held Pending A Decision in Bagwell.

Because Bagwell has already been fully briefed and argued, consolidation of the two cases is not feasible. In any event, no benefit would be gained by holding this case pending resolution of Bagwell, regardless of its outcome. If the Court finds the Bagwell fines to be civil, that decision clearly will not affect the contempt judgments in this case. If the Court decides in Bagwell that fines imposed pursuant to a previously established fee schedule constitute criminal penalties, that determination also will have no effect on these proceedings, because Bagwell will not have automatic retroactive application to the contempt sanctions in Terry I. See Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993); Teague v. Lane, 489 U.S. 288 (1989).[15] Under these circumstances, denying this petition will in no way "tip the hand" of the Court as to its views of the merits of Bagwell.

Moreover, this case is factually different from Bagwell in several significant respects. Unlike the petitioners in Bagwell, Petitioners cannot plausibly raise any question at this time regarding the appropriateness of the amount of sanctions. The District Court in Terry I made a substantial inquiry into the financial ability of the defendants to pay the

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[15] Denial of certiorari does not leave Petitioners without recourse if the Bagwell contempt fines are found to be criminal in nature. Petitioners may file a motion before the District Court pursuant to Fed. R. Civ. P. 60(b) seeking to obtain relief from the final judgment in Terry I.

sanctions provided for in the injunction. 697 F. Supp. at 1333, 1352-53. Defendant Terry declined to provide the court with his personal financial information, id. at 1333 & n.10, and, in his capacity as Operation Rescue's custodian of records, refused to answer discovery requests regarding Operation Rescue's finances and assets. Terry I, 886 F.2d at 1354-57. With one exception, the Petitioners in Terry II did not claim an inability to pay at the time the District Court imposed contempt sanctions. Petition App. at A-105-A-107, A-111-A-124 (listing contemnors' arguments).[16] Having failed to raise this issue below, Petitioners should not be permitted to argue that the sheer size of the fines is so burdensome as to amount to punitive sanctions. See Petition at 10 (urging Court to grant certiorari or hold case pending Bagwell "[i]n view of the excessive monetary penalties").

Moreover, the amount of the fines imposed on Petitioners, while significant, simply bears no comparison to the $52 million dollar sanctions imposed in Bagwell. Here, individual Petitioners were fined in amounts ranging from $25,000 to $100,000, with additional contempt-related attorney's fees ranging from approximately $3,000 to approximately $22,000, with most attorney's fee awards in the range from $6,000 to $12,000. Contrary to Petitioners' arguments, Petition at 10, the size of these sanctions is in no way comparable to Bagwell, and simply does not warrant the conclusion that the sanctions are punitive in nature.

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[16] The only Petitioner in Terry II to raise a question regarding inability to pay the fines was Slattery, a portion of whose fine was subsequently stayed. Petition App. at A-50-A-51.

In Bagwell, the trial court held the International and local unions of the United Mine Workers of America (collectively, the "Union") in contempt of its injunction. In order to induce the Union to comply, the court set a schedule of prospective civil fines of $100,000 for each violent violation and $20,000 for each non-violent violation. The fines were to double each day, without limitation. Petitioner's Brief at 3, Bagwell, No. 92-1625 (citing trial court order). The court eventually imposed fines totalling over $64 million and, after reductions, amounting to $52 million.

The trial court in Bagwell apparently imposed sanctions on the Union for violent acts of individuals who were never demonstrated to be union members. See Petitioner's Petition for Certiorari at 3 & n.1; Petitioner's Brief at 3-4 & n.1 Bagwell, No. 92-1625. Moreover, after the underlying labor dispute was settled and both parties to the litigation asked the court to vacate its contempt sanctions, the court refused to vacate $52 million in fines, in part because it found that the Union's conduct had been aimed at the state of Virginia at large and had affected "members of the public . . . who had no connection with any of the litigants," causing the state authorities to mobilize massive resources to maintain order. Government's Amicus Brief in Support of Respondent Bagwell, Bagwell, No. 92-1625 (quoting trial court decision). Finally, the size of the fines in Bagwell might raise a question of whether the sheer magnitude of the sanctions somehow renders them punitive.

None of these factors are present in Terry II; on the contrary, the District Court took great pains to ensure that the sanctions were directed at the appropriate persons, were calculated to achieve a coercive purpose, and were appropriate in amount. In contrast to Bagwell, the District Court here only imposed sanctions on Operation Rescue and

non-party Petitioners for each person's own actions in organizing and carrying out demonstrations in violation of the injunction. See Terry I, 697 F. Supp. at 1331. Unlike the Union in Bagwell, neither Operation Rescue nor non-party Petitioners was fined for the acts of others, and particularly not for the acts of unidentified persons not shown to be members of an organizational defendant. Rather, the contemnors in Terry II were each held accountable for their own violations. Petition App. at A-124-A-134.

The District Court showed an appropriate flexibility in enforcing the contempt sanctions in order to achieve their coercive purpose. For example, the court did not initially impose doubling of penalties, but only did so after its earlier sanctions were shown to be ineffective as a deterrent. Terry I, 704 F. Supp. at 1263-64. Moreover, the District Court agreed to stay enforcement of half of the sanctions imposed on non-party Petitioner Slattery, as long as Slattery refrained from future violations of the injunction. Petition App. at A-50-A-51. By contrast, the court in Bagwell refused to abate the penalties after they could serve no further coercive purpose, and even after the party that initially moved for contempt requested that the fines be vacated.

In this case, the prospective sanctions were not only legitimate when imposed, they continue to be necessary to enforce future compliance with the court's mandate. Operation Rescue clearly has not renounced its policy of closing down clinics through unlawful blockades, as demonstrated by the many clinic blockades around the country initiated and led by Operation Rescue and other Petitioners since the 1988 and 1989 demonstrations at issue here. Petitioners cannot and do not argue that changed circumstances have rendered the permanent injunction

protecting the New York clinics unnecessary. The conduct that prompted the issuance of the injunction in Terry I therefore remains an ongoing threat and the prospective sanctions retain their remedial purpose. Moreover, to permit Petitioners to evade the consequences of their past defiance of the District Court's orders would only serve to encourage future violations.[17]

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[17] Petitioners' suggestion that the District Court was required to conform the prospective contempt sanctions to New York State law, Petition at 25 n.14, is foreclosed by their failure to raise it in Terry I, see Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) (res judicata bars issues that were raised or could have been raised), and is flatly contradicted by this Court's precedents. The Federal courts have inherent power to compel obedience to their judgments and orders. Spallone v. United States, 493 U.S. 265, 276 (1990). So long as a federal court employs its inherent power to control the parties' "conduct during the litigation," Chambers v. Nasco, Inc., 111 S. Ct. 2123, 2138 (1991), "the district court's inherent power . . . [cannot] be made subservient to any state policy without transgressing the boundaries" established in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), and its progeny. Chambers, 111 S. Ct. at 2138. Here, the District Court employed contempt power for just such a purpose by imposing fines to coerce Petitioners to comply with the injunction. After Chambers, Petitioners' argument, so obviously destructive to the federal contempt power, borders on frivolous and certainly provides no basis to grant certiorari. Nor is this a case where the Court must decide whether "a federal remedy can be provided even in the absence of a similar state remedy," Stern v. South Chester Tube Co., 390 U.S. 606, 609 (1968) (citing Guffey v. Smith, 237 U.S. 101 (1915)), because the "remedy" N.O.W. obtained, an award of

Because this case is so factually distinct from Bagwell, there is no reason for this Court to grant certiorari to consider this case along with Bagwell or to hold the case pending a disposition in Bagwell. Accordingly, the petition should be denied.

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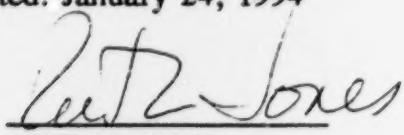
attorney's fees for bringing the contempt motion, is equally available under New York state law. See, e.g., 3855 B'way Laundromat, Inc. v. 600 W. 161st St. Corp., 156 A.D.2d 202, 548 N.Y.S.2d 461 (1st Dep't 1989).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Dated: January 24, 1994



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APPENDICES

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX A

Respondents Complaint

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 8315/88

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; NEW YORK CITY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN; NATIONAL ORGANIZATION FOR WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS-NEW YORK METROPOLITAN AREA; NEW YORK STATE NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC.; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; EASTERN WOMEN'S CENTER, INC.; PLANNED PARENTHOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC (BROOKLYN); PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUFFOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR; RABBI DENNIS MATH; REVEREND DONALD MORLAN; PRO-CHOICE COALITION,

Plaintiffs,

—against—

RANDALL TERRY; OPERATION RESCUE; REVEREND JAMES P. LISANTE; THOMAS HERLIHY; JOHN DOE(S) AND JANE DOE(S), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein,

Defendants.

COMPLAINT

The plaintiffs, by their attorneys, Joan P. Gibbs, David Cole, and Rhonda Copelon, all associated with the Center for Constitutional Rights with offices at 666 Broadway, 7th Floor, New York, New York, 10012, and Sarah E. Burns and Alison Wetherfield of the Now Legal Defense & Education Fund, 99 Hudson Street, New York 10013, and 1333 H Street NW, 11th Floor, Washington, D.C., 20005, complain of the defendants and allege:

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief addressed to impending actions directly threatening the health and safety of hundreds of women seeking abortions or other family planning services in clinics and other facilities in New York State during the week of April 30, 1988 to May 7, 1988. Plaintiffs, who include organizations representing the affected women and a class of clinics and abortion providers in New York City, Nassau, Suffolk, and Westchester Counties, seek a limited injunctive order ensuring that defendants' actions do not infringe plaintiffs' constitutional, statutory, and common law rights to obtain and provide abortions and other family planning and medical services and to enjoy protection from tortious interference with their exercise of these rights. Plaintiffs require immediate injunctive relief to forestall a meticulously planned series of tortious actions called "Operation Rescue" (hereinafter "the Operation") involving the blockade and harassment of family planning clinics and abortion providers within the City of New York, Nassau, Suffolk, and Westchester Counties, by defendant organizations and individuals, and others acting in concert with them or on their behalf.

2. Upon information and belief, defendants intend to block access to abortion providers, to obstruct the provision of abortion and other family planning services, and to intimi-

date, harass and restrain women attempting to use the services of the clinics. Defendants' actions are scheduled to take place in the City of New York and Nassau, Suffolk and Westchester Counties from April 30 to May 7, 1988, but defendants purposely have not indicated which providers they will specifically target in order to frustrate efforts to protect the affected facilities and patients. Defendants' actions will greatly increase the health risks faced by women seeking counseling, abortions, and other services in the targeted facilities, and therefore plaintiffs require immediate injunctive relief.

PARTIES

Plaintiffs

3. Plaintiff, the New York State National Organization for Women (hereinafter "NY NOW"), is a membership organization with 10,000 members with offices at 90 State Street, Albany, New York 12207, and at 151 W. 74th St., NY, New York 10023. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

4. Plaintiff, the New York City Chapter of the National Organization for Women, is a membership organization with offices at 15 West 18th Street, New York, New York 10011. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

5. Plaintiff, the National Organization for Women, is a membership organization with 160,000 members with offices at 1401 New York Avenue, N.W., Washington, DC 20005. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

6. Plaintiff, the Religious Coalition for Abortion Rights-New York Metropolitan Area (hereinafter "RCAR") is a coalition of organizations and individuals with offices at 198 Broadway, Room 805, New York, New York 10038. It sues on behalf of itself and its members, who include women with various religious beliefs who support the right to choose abortions and who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

7. Plaintiff, New York National Abortion Rights Action League, Inc. is a membership organization with offices at 2 West 64th Street, New York, New York 10023. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

8. Plaintiff, Planned Parenthood of New York City, Inc., is a membership organization with offices at 276 5th Avenue, Suite 808, New York, New York 10011. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties from April 30 to May 7, 1988.

9. Plaintiff, Eastern Women's Center, Inc., is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

10. Plaintiff, Planned Parenthood Clinic (Bronx), is a health care facility that provides abortions and other family planning services, located in Bronx County. It sues on behalf of itself, its staff, and its patients.

11. Plaintiff, Planned Parenthood Clinic (Brooklyn), is a health care facility that provides abortions and other family planning services, located in Kings County. It sues on behalf of itself, its staff, and its patients.

12. Plaintiff, Planned Parenthood Margaret Sanger Clinic (Manhattan), is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

13. Plaintiff, Ob-Gyn Pavilion, is a health care facility that provides abortions and other family planning services, located in Kings County. It sues on behalf of itself, its staff, and its patients.

14. Plaintiff, The Center for Reproductive and Sexual Health (CRASH), is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

15. Plaintiff, VIP Medical Associates, is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

16. Plaintiff, Bill Baird Institute (Suffolk) is a health care facility that provides abortions and other family planning services, located in Suffolk County. It sues on behalf of itself, its staff, and its patients.

17. Plaintiff, Bill Baird Institute (Nassau) is a health care facility that provides abortions and other family planning services, located in Nassau County. It sues on behalf of itself, its staff, and its patients.

18. Plaintiff, Bill Baird, is director of the Bill Baird Institutes in Nassau and Suffolk counties. He sues on behalf of himself, his staff, and his patients.

19. Plaintiff, Thomas J. Mullin, M.D., F.A.C.O.G., is the medical director of plaintiff Eastern Women's Center. He sues on behalf of himself, his staff and his patients.

20. Plaintiff, the Reverend Beatrice Blair, is a minister associated with Saint Marks Church In The Bowery, and the Chair of RCAR. Saint Marks Church In The Bowery is located at 131 East 10th Street, New York, New York.

21. Plaintiff, Rabbi Dennis Math, is the Vice-President of RCAR, and the Rabbi for the Village Temple, located at 33 East 12th Street, New York, New York.

22. Plaintiff, the Reverend Donald Morlan, is the Treasurer of RCAR, and is associated with the American Baptist Churches of Metropolitan New York with offices at 322 8th Avenue, New York, New York.

23. Plaintiff, the Pro-Choice Coalition, is a coalition of organizations and individuals dedicated to assuring the constitutional right of women to choose abortion. It sues on behalf of itself and its members who are required to devote their resources to providing protection for women needing to use the services of planning clinics and abortion providers in the face of defendants' planned blockade.

Class Allegations

24. Plaintiff family planning clinics and abortion providers sue on behalf of a class of all family planning clinics and abortion providers and their staff and patients in New York City, Nassau, Suffolk and Westchester Counties. The class is so numerous that joinder of all members is impracticable. Common questions of law and fact predominate over any questions affecting individual members of the class. The claims of the representative clinics and providers are typical of the claims of the class. The representative clinics and providers will fairly and adequately protect the interests of the class. A class action is superior to other available methods for a fair and efficient adjudication of this controversy.

Defendants

25. Upon information and belief, defendant Randall Terry, acting in concert with other defendants and others unknown, is the Executive Director of Project Life and the National Organizer of "Operation Rescue," and resides in Windsor, New York.

26. Upon information and belief, defendant "Operation Rescue" (hereinafter "the Operation") is a group of organi-

zations and individuals, with offices in Binghampton, New York. Its purpose is to organize and coordinate disruptions of abortion and family planning facilities, including the blockades scheduled from April 30 to May 7, 1988 in the New York City area. The Operation's literature lists its address as P.O. Box 1180, Binghampton, New York 13902, and its telephone number as (607) 723-4012.

27. Upon information and belief, defendant Reverend James P. Lisante, acting in concert with the other defendants and others unknown, is one of the organizers of the blockades scheduled for April 30 to May 7, 1988 in the New York City area. He is the Respect Life Coordinator for the Diocese of Rockville Centre, New York.

28. Upon information and belief, defendant Thomas Herlihy, acting in concert with other defendants and others unknown, is an officer of the Prolife Nonviolent Action Project, and a co-sponsor of the Operation. He resides in the Bronx, New York.

29. Defendants "John Doe(s)" and "Jane Doe(s)" are fictitious names, the real names of said defendants being presently unknown to plaintiffs. These fictitious names are intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

FACTS

30. The defendants, pursuant to a conspiracy that they have entitled "Operation Rescue," plan to obstruct and close down facilities at which abortions are performed in the New York City area from April 30 to May 7, 1988 by trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from such facilities, intimidating and harassing patients and visitors, staging disruptive protests, and otherwise disrupting and interfering with the operations of such facilities.

31. The defendants do not accept the decisions of the United States Supreme Court that the United States Constitution guarantees and protects a woman's right to choose abortion and to carry out that decision, and they intend to interfere with those rights of women attending the targeted clinics and providers.

32. Upon information and belief, defendants in carrying out the Operation will be joined by approximately 1000 people from various parts of the country.

33. Defendants' own published plans for the New York Operation state explicitly that they intend to "close down abortion mills" in the New York City area, and specifically to "prevent abortion mill employees or pregnant mothers from entering" the clinics. Defendants' instructions to their co-conspirators acknowledge that they are likely to be arrested, and state that even if the police make arrests and seek to "disperse the crowd, the goal you must have is to keep the doorway occupied."

34. Defendants have not publicly stated which clinics in New York City the Operation will target. Upon information and belief, defendants intend to keep this aspect of the New York Operation secret in order to frustrate attempts to protect and guarantee women's access to the clinics and providers. Plaintiff organizations intend to help protect and guarantee women's access to the facilities during the course of the Operation, but are frustrated in their attempts to do so by defendants' refusal to identify the targeted facilities.

35. Upon information and belief, upon their arrival in the City of New York, certain of the defendants will be staying at The Times Square Hotel at 255 West 43rd Street, New York, New York, and The Days Inn at 440 West 57th Street, New York, New York. Upon information and belief, others will be provided housing arranged by defendant Reverend James P. Lisante.

36. Plans for the New York Operation were first announced by defendant Randall Terry and certain other

defendants at a Pro-Life Action Network Conference in Atlanta, Georgia in May 1987. Ever since that time defendant Terry along with the other defendants have organized for this Operation, distributed fliers inviting others to participate, staged rallies and other organizing events, including "field training sessions," throughout the country.

37. On November 28, 1987, after an Operation "field training session" in Philadelphia, defendant Terry and certain other defendants conducted an all-day blockade of the Cherry Hill Women's Center in Cherry Hill, New Jersey. Upon information and belief, defendant Terry characterized this blockade as "a dry run for the first week in May . . . in New York City."

38. During the "dry run" in Cherry Hill, the doors to the Cherry Hill Women's Center were blocked by defendant Terry and other defendants for approximately nine and a half hours and over 200 people were arrested on trespass charges, which are still pending.

39. Participants in the trespass action at the Cherry Hill Women's Center, who came from various parts of the country, began gathering at the Cherry Hill Women's Center at approximately 6:00 a.m. and remained until 4:30 p.m., during which time they completely blocked all entrance to the Center, screamed and shouted at the women who had come to the Center for services, at the Center's staff, and at passersby, and damaged the front door and an outside speaker.

40. Thirty-eight women had appointments for abortions at the Cherry Hill Women's Clinic on November 28, 1987. As a result of the defendant Terry's and certain other defendants' activities, thirty-three of the women who had appointments for abortions that day could not be served. The other five women, who were in the middle of a two-day procedure, had to be treated by the Center's physician at an emergency alternative location.

41. On December 2, 1987, the Honorable Paul A. Lowengrub of the Superior Court of New Jersey, Chancery Divi-

sion, Camden County, entered an interlocutory injunction against defendants Randall Terry, the New York Central Pro-Life Federation and others, enjoining them from, *inter alia*, "invading or trespassing upon the property known as 502 North Kings Highway, Cherry Hill, New Jersey, also known as the Cherry Hill Women's Center, (2) from gathering, parading, patrolling or picketing the premises of the plaintiff Cherry Hill Women's Center in such a manner as to disrupt, intimidate or harass the executive staff, employees or patients of the Cherry Hill Women's Center and (3) from intentionally interfering with the flow of traffic into and out of the Cherry Hill Women's Center's premises by blocking or obstructing ingress into or egress from same . . ." *Cherry Hill Women's Center v. John Does 1 to 500*, Civ. A. No. C-03654-87 (Sup. Ct. N.J. Dec. 2, 1987) (interlocutory injunction).

42. Defendants intend to replicate the Cherry Hill blockade each day of the New York Operation, at various clinics and abortion providers' offices in New York City and the surrounding counties. The Operation is intended to have and will have the effect of denying or disrupting women's access to the targeted clinics with the intended result that many women will have to delay their scheduled services. Any delay in the provision of health services relating to childbirth and abortion significantly increases the health risks faced by the women affected. Therefore, unless defendants' planned activities are enjoined, substantial and irreparable damage will be done to women patients' health and safety, and to their rights to choose an abortion and to carry out that decision, as well as to the plaintiff clinics' rights to conduct their business.

43. Plaintiffs have no adequate remedy at law.

AS AND FOR A FIRST CAUSE OF ACTION

44. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

45. The actions planned by defendants, which are directed at women seeking abortions and other family planning services at the targeted facilities, jointly and individually, violate the laws of New York City and New York State, including New York Civil Rights Law, Section 40(c), and New York Executive Law Section 296.

AS AND FOR A SECOND CAUSE OF ACTION

46. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

47. The actions planned by defendants, jointly and individually, constitute a public nuisance designed to, and having the effect of, endangering the public security, safety and welfare of the City of New York, and its residents, especially those women seeking to obtain abortions or other family planning or medical services at facilities where abortions are performed.

AS AND FOR A THIRD CAUSE OF ACTION

48. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

49. The actions planned by defendants, jointly and individually, constitute a tortious interference with plaintiff facilities' business.

AS AND FOR A FOURTH CAUSE OF ACTION

50. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

51. The actions planned by defendants, jointly and individually, constitute a tortious intentional trespass on the targeted clinics and abortion providers.

AS AND FOR A FIFTH CAUSE OF ACTION

52. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

53. The actions of defendants, jointly and individually, constitute tortious intentional infliction of emotional harm on patients and employees of the plaintiff clinics and abortion providers.

AS AND FOR A SIXTH CAUSE OF ACTION

54. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

55. The actions planned by defendants, jointly and individually, constitute tortious harassment of patients and employees of the plaintiff clinics and abortion providers.

AS AND FOR A SEVENTH CAUSE OF ACTION

56. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

57. The actions planned by defendants, jointly and individually, constitute false imprisonment of patients and employees of the plaintiff clinics and providers.

AS AND FOR AN EIGHTH CAUSE OF ACTION

58. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

59. Defendants conspired together with each other and other parties presently unknown for the purpose of denying women seeking abortions and other family planning services at targeted facilities the equal protection of the laws and the equal privileges and immunities under the law and obstructing travel, in violation of 42 U.S.C. § 1985(3). Defendants are and continue to be motivated by an invidiously discrimi-

natory animus directed at the class of women seeking to exercise their constitutional and legal right to choose abortions and other family planning services at the targeted facilities, as well as at all facilities in the New York City area.

WHEREFORE, plaintiffs demand judgment, together with costs, fees and disbursements of this action as follows:

1. Declaring that the planned actions of defendants are violative of plaintiffs' rights to obtain and provide abortions under the United States Constitution and the statutes and common law of New York; and

2. Granting plaintiffs a preliminary and permanent injunction restraining and enjoining the defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, in any manner or by any means from:

(a) trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, including demonstrating within 15 feet of any persons seeking access to or leaving those facilities, from April 30, 1988 to May 7, 1988, or the conclusion of a planned blockade called "Operation Rescue," whichever is later;

(b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from April 30, 1988 to May 7, 1988, or the conclusion of blockade activities, whichever is later;

(c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of the clinics;

(d) attempting or directing others to take any of the actions described in paragraphs (a), (b), and (c) above; and

(3) providing that nothing in the Court's Order should be construed to limit defendants' exercise of their legitimate First Amendment rights; and

(4) directing the defendant organizations and their officers, and the defendant individuals and those working in concert with them, to instruct all members of the organizations and conspiracy believed to be planning to participate in the activities enumerated above not to engage or participate in any such activities enjoined in paragraphs (a) through (d) above; and

(5) granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ JOAN P. GIBBS
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Dated: New York, New York
April 25, 1988

* Admitted to practice in Pennsylvania.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; NEW YORK CITY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN, NATIONAL ORGANIZATION FOR WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS-NEW YORK METROPOLITAN AREA; NEW YORK STATE NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC.; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; EASTERN WOMEN'S CENTER, INC.; PLANNED PARENTHOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC (BROOKLYN); PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR; RABBI DENNIS MATH; REVERENT DONALD MORLAN; PRO-CHOICE COALITION

Plaintiffs,

Index No.
88 Civ. 3071 (RJW)

-against-

AMENDED COMPLAINT

RANDALL TERRY, individually and as president of OPERATION RESCUE, an uncorporated association, REVEREND JAMES P. LISANTE; THOMAS HERLIHY; JOHN DOE(S) AND JANE DOE(S), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein,

Defendants.

----------x

The plaintiffs, by their attorneys, Joan P. Gibbs, David Cole, and Rhonda Copelon, all associated with the Center for [2] Constitutional Rights with offices at 666 Broadway, 7th Floor, New York, New York 10012, and Sarah E. Burns and Alison Wetherfield of the NOW Legal Defense & Education Fund, 99 Hudson Street, New York 10013, and 1333 H Street NW, 11th Floor, Washington, D.C., 20005, complain of the defendants and allege:

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief addressed to impending actions directly threatening the health and safety of hundreds of women seeking abortions or other family planning services in clinics and other facilities in New York State during the week of April 30, 1988 to May 7, 1988. Plaintiffs, who include organizations representing the affected women and a class of clinics and abortion providers in New York City, Nassau, Suffolk, and Westchester Counties, seek a limited injunctive order ensuring that defendants' actions do not infringe plaintiffs' constitutional, statutory, and common law rights to obtain and provide abortions and other family planning and medical services and to enjoy protection from tortious interference with their exercise of these rights. Plaintiffs require immediate injunctive relief to forestall a meticulously planned series of tortious actions called "Operation Rescue" (hereinafter "the Operation") involving the blockade and harassment of family planning clinics and abortion providers within the City of New York, Nassau, Suffolk, and Westchester Counties, by defendant organizations and individuals, and others acting in concert with them or on their behalf. [3]

2. Upon information and belief, defendants intend to block access to abortion providers, to obstruct the provision

of abortion and other family planning services, and to intimidate, harass and restrain women attempting to use the services of the clinics. Defendants' actions are scheduled to take place in the City of New York and Nassau, Suffolk and Westchester Counties from April 30 to May 7, 1988, but defendants purposely have not indicated which providers they will specifically target in order to frustrate efforts to protect the affected facilities and patients. Defendants' actions will greatly increase the health risks faced by women seeking counseling, abortions, and other services in the targeted facilities, and therefore plaintiffs require immediate injunctive relief.

PARTIES

Plaintiffs

3. Plaintiff, the New York State National Organization for Women (hereinafter "NY NOW"), is a membership organization with 10,000 members with offices at 90 State Street, Albany, New York 12207, and at 151 W. 74th St., NY, New York 10023. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

4. Plaintiff, the New York City Chapter of the National Organization for Women, is a membership organization with offices at [4] 15 West 18th Street, New York, New York 10011. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

5. Plaintiff, the National Organization for Women, is a membership organization with 160,000 members with offices at 1401 New York Avenue, N.W., Washington, DC 20005. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

6. Plaintiff, the Religious Coalition for Abortion Rights - New York Metropolitan Area (hereinafter "RCAR") is a coalition of organizations and individuals with offices at 198 Broadway, Room 805, New York, New York 10038. It sues on behalf of itself and its members, who include women with various religious beliefs who support the right to choose abortions and who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

7. Plaintiff, New York State National Abortion Rights Action League, Inc. is a membership organization with offices at 2 West 64th Street, New York, New York 10023. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties in the period from April 30, to May 7, 1988.

8. Plaintiff, Planned Parenthood of New York City, Inc., is a [5] membership organization with offices at 276 5th Avenue, Suite 808, New York, New York 10011. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties from April 30 to May 7, 1988.

9. Plaintiff, Eastern Women's Center, Inc., is a

health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

10. Plaintiff, Planned Parenthood Clinic (Bronx), is a health care facility that provides abortions and other family planning services, located in Bronx County. It sues on behalf of itself, its staff, and its patients.

11. Plaintiff, Planned Parenthood Clinic (Brooklyn), is a health care facility that provides abortions and other family planning services, located in Kings County. It sues on behalf of itself, its staff, and its patients.

12. Plaintiff, Planned Parenthood Margaret Sanger Clinic (Manhattan), is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

13. Plaintiff, Ob-Gyn Pavilion, is a health care facility that provides abortions and other family planning services, located in Kings County. It sues on behalf of itself, its staff, and its patients.

14. Plaintiff, The Center for Reproductive and Sexual Health [6] (CRASH), is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

15. Plaintiff, VIP Medical Associates, is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

16. Plaintiff, Bill Baird Institute (Suffolk) is a health care facility that provides abortions and other family planning services, located in Suffolk County. It sues on behalf of itself, its staff, and its patients.

17. Plaintiff, Bill Baird Institute (Nassau) is a health care facility that provides abortions and other family planning services, located in Nassau County. It sues on behalf of itself, its staff, and its patients.

18. Plaintiff, Bill Baird, is director of the Bill Baird Institutes in Nassau and Suffolk counties. He sues on behalf of himself, his staff, and his patients.

19. Plaintiff, Thomas J. Mullin, M.D., F.A.C.O.G., is the medical director of plaintiff Eastern Women's Center. He sues on behalf of himself, his staff and his patients.

20. Plaintiff, the Reverend Beatrice Blair, is a minister associated with Saint Marks Church In The Bowery, and the Chair of RCAR. Saint Marks Church In The Bowery is located at 131 East 10th Street, New York, New York.

21. Plaintiff, Rabbi Dennis Math, is the Vice-President of [7] RCAR, and the Rabbi for the Village Temple, located at 33 East 12th Street, New York, New York.

22. Plaintiff, the Reverend Donald Morlan, is the Treasurer of RCAR, and is associated with the American Baptist Churches of Metropolitan New York with offices at 322 8th Avenue, New York, New York.

23. Plaintiff, the Pro-Choice Coalition, is a coalition of organizations and individuals dedicated to assuring the constitutional right of women to choose abortion. It sues on behalf of itself and its members who are required to

devote their resources to providing protection for women needing to use the services of planning clinics and abortion providers in the face of defendants' planned blockade.

Class Allegations

24. Plaintiff family planning clinics and abortion providers sue on behalf of a class of all family planning clinics and abortion providers and their staff and patients in New York City, Nassau, Suffolk and Westchester Counties. The class is so numerous that joinder of all members is impracticable. Common questions of law and fact predominate over any questions affecting individual members of the class. The claims of the representative clinics and providers are typical of the claims of the class. The representative clinics and providers will fairly and adequately protect the interests of the class. A class action is superior to other available methods for a fair and efficient adjudication of this controversy.

[8] Defendants

25. Upon information and belief, defendant Randall Terry, acting in concert with other defendants and others unknown, is the Executive Director of Project Life and the National Organizer of "Operation Rescue," and resides in Windsor, New York. Defendant Terry is sued in his individual capacity and in his representative capacity as president of "Operation Rescue", an unincorporated association.

26. Upon information and belief, defendant "Operation Rescue" (hereinafter "the Operation") is an unincorporated association, with offices in Binghamton, New York, whose members' purpose is to organize and coordinate disruptions of abortion and family planning facilities, including the

blockades scheduled from April 30 to May 7, 1988 in the New York City area. The Operation's literature lists its address as P.O. Box 1180, Binghamton, New York 13902, and its telephone number as (607) 723-4012.

27. Upon information and belief, defendant Reverend James P. Lisante, acting in concert with the other defendants and others unknown, is one of the organizers of the blockages scheduled for April 30 to May 7, 1988 in the New York City area. He is the Respect Life Coordinator for the Diocese of Rockville Center, New York.

28. Upon information and belief, defendant Thomas Herlihy, acting in concert with other defendants and others unknown, is an office of the Prolife Nonviolent Action Project, and a co-sponsor of the Operation. He resides in the Bronx, New York.

29. Defendants "John Doe(s)" and "Jane Doe(s)" are fictitious names, the real names of said defendants being presently unknown to plaintiffs. These fictitious names are **[9]** intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

FACTS

30. The defendants, pursuant to a conspiracy that they have entitled "operation Rescue," plan to obstruct and close down facilities at which abortions are performed in the New York City area from April 30 to May 7, 1988 by trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from such facilities, intimidating and harassing patients and visitors, staging disruptive protests, and otherwise disrupting and interfering with the operations

of such facilities.

31. The defendants do not accept the decisions of the United States Supreme Court that the United States Constitution guarantees and protects a woman's right to choose abortion and to carry out that decision, and they intend to interfere with those rights of women attending the targeted clinics and providers.

32. Upon information and belief, defendants in carrying out the Operation will be joined by approximately 1000 people from various parts of the country.

33. Defendants' own published plans for the New York Operation state explicitly that they intend to "close down abortion mills" in the New York City area, and specifically to "prevent abortion mill employees or pregnant mothers from entering" the clinics. Defendants' instructions to their co- **[10]** conspirators acknowledge that they are likely to be arrested, and state that even if the police make arrests and seek to "disperse the crowd, the goal you must have is to keep the doorway occupied."

34. Defendants have not publicly stated which clinics in New York City the Operation will target. Upon information and belief, defendants intend to keep this aspect of the New York Operation secret in order to frustrate attempts to protect and guarantee women's access to the clinics and providers. Plaintiff organizations intend to help protect and guarantee women's access to the facilities during the course of the Operation, but are frustrated in their attempts to do so by defendants' refusal to identify the targeted facilities.

35. Upon information and belief, upon their arrival in the City of New York, certain of the defendants will be

staying at The Times Square Hotel at 255 West 43rd Street, New York, New York, and The Days Inn at 440 West 57th Street, New York, New York. Upon information and belief, others will be provided housing arranged by defendant Reverend James P. Lisante.

36. Plans for the New York Operation were first announced by defendant Randall Terry and certain other defendants at a Pro-Life Action Network Conference in Atlanta, Georgia in May 1987. Ever since that time defendant Terry along with the other defendants have organized for this Operation, distributed fliers inviting others to participate, staged rallies and other organizing events, including "field training sessions," throughout [11] the country.

37. On November 28, 1987, after an Operation "field training session" in Philadelphia, defendant Terry and certain other defendants conducted an all-day blockade of the Cherry Hill Women's Center in Cherry Hill, New Jersey. Upon information and belief, defendant Terry characterized this blockade as "a dry run for the first week in May. . . in New York City."

38. During the "dry run" in Cherry Hill, the doors to the Cherry Hill Women's Center were blocked by defendant Terry and other defendants for approximately nine and a half hours and over 200 people were arrested on trespass charges, which are still pending.

39. Participants in the trespass action at the Cherry Hill Women's Center, who came from various parts of the country, began gathering at the Cherry Hill Women's Center at approximately 6:00 a.m. and remained until 4:30 p.m., during which time they completely blocked all entrance to the Center, screamed and shouted at the women

who had come to the Center for services, at the Center's staff, and at passersby, and damaged the front door and an outside speaker.

40. Thirty-eight women had appointments for abortions at the Cherry Hill Women's Clinic on November 28, 1987. As a result of the defendant Terry's and certain other defendants' activities, thirty-three of the women who had appointments for abortions that day could not be served. The other five women, who were in the middle of a two-day procedure, had to be treated by the Center's physician [12] at an emergency alternative location.

41. On December 2, 1987, the Honorable Paul A. Lowengrub of the Superior Court of New Jersey, Chancery Division, Camden County, entered an interlocutory injunction against defendants Randall Terry, the New York Center Pro-Life Federation and others, enjoining them from, inter alia, "invading or trespassing upon the property known as 502 North Kings Highway, Cherry Hill, New Jersey, also known as the Cherry Hill Women's Center, (2) from gathering, parading, patrolling or picketing the premises of the plaintiff Cherry Hill Women's Center in such a manner as to disrupt, intimidate or harass the executive staff, employees or patients of the Cherry Hill Women's Center and (3) from intentionally interfering with the flow of traffic into and out of the Cherry Hill Women's Center's premises by blocking or obstructing ingress into or egress from same..." Cherry Hill Women's Center v. John Does 1 to 500, Civ. A. No. C-03654-87 (Sup. Ct. N.J. Dec. 2, 1987)(interlocutory injunction).

42. Defendants intend to replicate the Cherry Hill blockade each day of the New York Operation, at various clinics and abortion providers' offices in New York City and the surrounding counties. The Operation is intended to

have and will have the effect of denying or disrupting women's access to the targeted clinics, with the intended result that many women will have to delay their scheduled services. Any delay in the provision of health services relating to childbirth and abortion significantly increases the health risks faced by the women affected. **[13]** Therefore, unless defendants' planned activities are enjoined, substantial and irreparable damage will be done to women patients' health and safety, and to their rights to choose an abortion and to carry out that decision, as well as to the plaintiff clinics' rights to conduct their business.

43. Plaintiffs have no adequate remedy at law.

AS AND FOR A FIRST CAUSE OF ACTION

44. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

45. The actions planned by defendants, which are directed at women seeking abortions and other family planning services at the targeted facilities, jointly and individually, violate the laws of New York City and New York State, including New York Civil Rights Law, Section 40(c), and New York Executive Law Section 296.

AS AND FOR A SECOND CAUSE OF ACTION

46. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

47. The actions planned by defendants, jointly and individually, constitute a public nuisance designed to, and having the effect of, endangering the public security, safety

and welfare of the City of New York, and its residents, especially those women seeking to obtain abortions or other family planning or medical services at facilities where abortions are performed.

AS AND FOR A THIRD CAUSE OF ACTION

[14] 48. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

49. The actions planned by defendants, jointly and individually, constitute a tortious interference with plaintiff facilities' business.

AS AND FOR A FOURTH CAUSE OF ACTION

50. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

51. The actions planned by defendants, jointly and individually, constitute a tortious intentional trespass on the targeted clinics and abortion providers.

AS AND FOR A FIFTH CAUSE OF ACTION

52. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

53. The actions of defendants, jointly and individually, constitute tortious intentional infliction of emotional harm on patients and employees of the plaintiff clinics and abortion providers.

AS AND FOR A SIXTH CAUSE OF ACTION

54. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

55. The actions planned by defendants, jointly and individually, constitute tortious harassment of patients and employees of the plaintiff clinics and abortion providers.

AS AND FOR A SEVENTH CAUSE OF ACTION

[15] 56. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

57. The actions planned by defendants, jointly and individually, constitute false imprisonment of patients and employees of the plaintiff clinics and providers.

AS AND FOR AN EIGHTH CAUSE OF ACTION

58. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

59. Defendants conspired together with each other and other parties presently unknown for the purpose of denying women seeking abortions and other family planning services at targeted facilities the equal protection of the laws and the equal privileges and immunities under the law and obstructing travel, in violation of 42 U.S.C. § 1985(3). Defendants are and continue to be motivated by an invidiously discriminatory animus directed at the class of women seeking to exercise their constitutional and legal right to choose abortions and other family planning services

at the targeted facilities, as well as at all facilities in the New York area.

WHEREFORE, plaintiffs demand judgment, together with costs, fees and disbursements of this actions as follows:

1. Declaring that the planned actions of defendants are violative of plaintiffs' rights to obtain and provide abortions under the United States Constitution and the statutes and common law of New York; and

[16] 2. Granting plaintiffs a preliminary and permanent injunction restraining and enjoining the defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, in any manner or by any means from:

a) trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, including demonstrating within 15 feet of any persons seeking access to or leaving those facilities, from April 30, 1988 to May 7, 1988, or the conclusion of a planned blockade called "Operation Rescue," whichever is later;

(b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester

Counties, from April 30, 1988 to May 7, 1988, or the conclusion of blockade activities, whichever is later;

c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of the clinics;

d) attempting or directing others to take any of [17] the actions described in paragraphs (a), (b), and (c) above; and

3. providing that nothing in the Court's Order should be construed to limit defendant's exercise of their legislative First Amendment rights, and

4. Directing the defendant organizations and their officers, and the defendant individuals and those working in concert with them, to instruct all members of the organizations and conspiracy believed to be planning to participate in the activities enjoined in paragraphs (a) through (d) above; and

5. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: New York, New York
August 15, 1988

* Admitted to practice in Pennsylvania
** Admitted to practice in Washington, D.C.

APPENDIX C

No. 89-1408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, REV. JAMES P. LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE DOES,

Petitioners,

—v.—

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, *et al.*,

Respondents,

CITY OF NEW YORK,

Respondent-Intervenor,

UNITED STATES OF AMERICA,

Respondent-Judgment Creditor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**Counsel of Record for Petitioners*

QUESTIONS PRESENTED

I. Whether the 42 U.S.C. 1985(3) requirement of class-based animus is satisfied by a class of women in general or a subclass of women abortion-seekers?

II. Whether brief non-violent sit-in demonstrations of a few hours occurring on public sidewalks in front of facilities in which abortions are performed violate the interstate Right to Travel of the plaintiffs or the purported individual women they were allowed to represent?

III. Whether the contempt fines of $50,000 (originally payable to plaintiff National Organization for Women, modified by the circuit court to be payable to the United States) and $19,141 (payable to the City of New York for police overtime), imposed on motion papers without a hearing, against defendants Randall Terry and Operation Rescue for engaging in two days of public demonstrations at two separate locations, were criminal in nature requiring due process protections for the defendants?

IV. Whether there existed genuine disputes of substantial material facts so as to preclude the district court from granting summary judgment under the doctrine of *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986)?

V. Whether public demonstrations containing elements of civil disobedience or individual acts of civil disobedience for political purposes may be treated in all respects as non-expressive conduct, deserving no First Amendment safeguards whatsoever?

VI. Whether the plaintiffs and plaintiff-intervenor lack Article III standing due to lack of a cognizable harm to any plaintiff?

VII. Whether the imposition of discovery sanctions against defendants and their *pro bono* counsel was an abuse of discretion in view of the constitutional privileges asserted?

PARTIES

In addition to the Petitioners and Respondents listed in the caption, the following are also Respondents in this action: New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; Pro Choice Coalition.

The United States of America was added as a party as a result of the court of appeals judgment below. Petitioner OPERATION RESCUE is not a corporation under Rule 28.1 of the Rules of this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, REV. JAMES P. LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE DOES,
Petitioners,

—v.—

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; *et al.*,
Respondents,

CITY OF NEW YORK,
Respondent-Intervenor,

UNITED STATES OF AMERICA,
Respondent-Judgment Creditor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Randall Terry, Operation Rescue,[1] Rev. James P. Lisante and Thomas Herlihy respectfully pray that a petition for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

1 Operation Rescue is not a corporation under Rule 28.1 of the Rules of this Court. Its status as a separate entity was an issue in the courts below.

This case involves the validity of injunctions against anti-abortion demonstrations in the City of New York and its environs, which injunctions provide for a $25,000 fixed unconditional fine *against each individual* for its initial violation and a doubling of the fine for each successive violation, *i.e.*, $50,000, then $100,000, then $200,000, etc. Unconditional contempt fines imposed on motion papers without a hearing of $50,000 (originally payable to Respondent National Organization for Women, but modified by the panel to be payable to the United States) and $19,141 (to the City of New York for police overtime because of failure to give 12 hours advance notice of the exact location of the demonstration) have already been imposed against Petitioners Terry and Operation Rescue for violations.[2]

This case arises in the context of political action and public protests, including "Operation Rescue" blockades of abortion sites, as a result of the abortion of many millions of unborn children in the United States since 1973. Petitioners believe that human life is precious. The miracle of conception and growth of human life within a mother's womb has been scientifically observed, documented and described.[3] However, since *Roe* v. *Wade*, 410 U.S. 113 (1973), thousands of arrests and prosecutions for trespass and other state law violations have occurred nationwide. Hundreds have been arrested in the New York City area alone.

The United States experienced similar wrenching social upheaval and political division with the Civil Rights and Vietnam war protests of previous decades.[4] The evident and powerful result of deeply held beliefs by Americans has always been political protest and civil dissent. It is certain that abor-

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2 Subsequent to the affirmance by the Second Circuit, the United States became a party to this action as Judgment Creditor of the $50,000 contempt fine and has vigorously pursued collection of this judgment, seizing the Christmas payroll of Operation Rescue on December 22, 1989.

3 *New Perspectives on Human Abortion*, Part I, Sec. 2: E. Blechschmidt M.D., *Human Being from the Very First* (1981).

4 Lambak, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 Yale L. & Pol'y Rev. 472, 480-81 (1987).

tion is the most divisive public issue of the last two decades,[5] perhaps the greatest national political and moral question since slavery.

In this case the district court granted summary judgment against the petitioners under the Ku Klux Klan Act, 42 U.S.C. Section 1985(3). The demonstrators were held to have had an invidiously discriminatory animus against a subclass of "women seeking abortions," violating their interstate Right to Travel, although it was evident that the demonstrations were aimed at the general public, and no evidence of any individual women whose interstate Right to Travel is claimed to have been violated was offered.

The following remarks of Justice O'Connor are appropriate as a prism through which the lower courts' decisions in this case may be viewed:

> Today's decision goes further, and makes it painfully clear that *no legal rule or doctrine is safe from ad hoc nullification by this Court, when an occasion for its application arises in a case involving* state regulation of *abortion.*
>
> • • •
>
> In so doing, the Court *prematurely decides serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness.* The constitutionality of the challenged provisions was not properly before this Court. There has been *no trial on the merits, and appellants have had no opportunity to develop facts that might have a bearing on the constitutionality* of the statute.
>
> • • •
>
> *Appellants should not have to prove that they are entitled to an opportunity to be heard.* (Emphasis added)

Thornburgh v. American Coll. of Obst. and Gyn., 476 U.S. 747, 814-816 (1986) (O'Connor, J., dissenting). Through numerous denials of Petitioners' requests for hearings, and a

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5 *Webster* v. *Reproductive Health Services, et al.*, 492 U.S. _____, 106 L. Ed.2d 410, 463 (1989) (Blackmun, J., dissenting and concurring in part).

misuse of the summary judgment procedure, the lower courts have repeatedly denied the Petitioners their entitled opportunity to be heard on constitutional issues of national import.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit Erroneously Held That Subgroupings of Gender-Based Animus Come Within the Purview of § 1985(3)

By finding that a subgrouping of gender, "women seeking abortions," was a sufficient class for § 1985(3), the Second Circuit has rejected the caution expressed by this Court in *United Broth. of Carpenters and Joiners, Local 610* v. *Scott*, 463 U.S. 825, 835 (1983), where this Court specifically refused to affirm that § 1985(3) "reaches conspiracies other than those motivated by racial bias." If it does, then this Court should say so and why.

The central dispute of this appeal involves 42 U.S.C. Section 1985(3) (1976 ed., Supp. V), The Ku Klux Klan Act of 1871.[6] The subject matter is abortion. Intervention by this Court is critical at this time to clarify the boundaries of the meaning of "class of persons" and "invidiously discriminatory animus," in an manner that lower federal courts can not mistake. The strongly worded cautions of this Court in *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott, supra*, are now being completely ignored by circuit courts, most stridently by the Second Circuit in this case.

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6 A *prima facie* case for relief under 42 U.S.C. Section 1985(3) must consist of alleging at least four necessary elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; (3) an act of furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Board of Carpenters and Joiners, Local 610 v. *Scott, supra*, at 828-29 (1983) (restating the test first formulated in *Griffin* v. *Breckenridge*, 403 U.S. 88, 102-03 (1971)).

The chart below sets forth in graphic terms the broad nationwide circuit conflict and resulting confusion over the application of Section 1985(3).

CIRCUIT	CLASS BASED ANIMUS
First	No circuit cases reach this issue
Second	Extremely broad view that women in general constitute a class as well as a subgrouping of "women seeking abortions" and wide standard of animus;[7] Religion;[8] political affiliation[9]
Third	Intra-circuit conflict: open question on class,[10] Sex[11]
Fourth	Intra-Circuit Panel Conflict; Race only;[12] Race & Religion;[13] Race, National Origin & Sex.[14]

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7 *N.Y. State Nat. Organization for Women* v. *Terry*, *supra* (A-37 to 43). Expansive view that "animus merely describes a person's basic attitude or intention." (A-42) *Cousins* v. *Terry*, 721 F.Supp. 426 (N.D.N.Y. 1989) (women seeking abortions).

8 *Colombrito* v. *Kelley*, 764 F.2d 122, 130-131 (2nd Cir. 1985).

9 *Keating* v. *Carey*, 706 F.2d 377, 386-388 (2nd Cir. 1983).

10 *Robinson* v. *Cantebury Village*, 849 F.2d 424, 430, n.7 (3rd Cir. 1988) (but non-minority employee speech against racist employer practices is sufficient, citing prior case).

11 *Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1243-44 (3rd Cir. 1978) (*en banc*), *rev'd on other grounds*, 442 U.S. 366 (1979); *Roe* v. *Operation Rescue*, 710 F.Supp. 577, 581 (E.D. Pa. 1989) (following *Novotny*, "women seeking abortions" approved).

12 *Harrison* v. *KVAT Food Management Inc.*, 766 F.2d 155 (4th Cor. 1985) (in depth analysis of Congressional intent and *Scott*: race only); *Mears* v. *Town of Oxford, M.D.*, 762 F.2d 368 (4th Cir. 1985) (race only)

13 *Trerice* v. *Summons*, 755 F.2d 1081, 1085 (4th Cir. 1985).

14 *Bushi* v. *Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985); *NOW* v. *Operation Rescue*, Civil Action No. 89-1558-A, slip op., 1989 U.S. Dist. Lexis 14919 at 21-22 (D.Va. December 6, 1989) (following *Bushi*, "women seeking abortions" approved).

Fifth	Intra-Circuit Conflict: 1) Race only;[15] 2) Race & Religion;[16] 3) Race, National Origin, Sex & and political beliefs and associations;[17] 4) Rejected women of childbearing age seeking medical attention [abortions].[18]
Sixth	Racial and Political classes.[19]
Seventh	Intra-Circuit panel conflict: 1) Race only;[20] 2) Race, Sex, Religion, Ethnicity, and Political Loyalty.[21]
Eighth	Sex and Ethnicity.[22]

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15 *Daigle* v. *Gulf Utilities Co.*, Local 2286, 794 F.2d 974, 978-79 (5th Cir. 1986); *Eitel* v. *Holland*, 787 F.2d 995, 1000 (5th Cir. 1986); *Rayborn* v. *Mississippi State Board of Dental Examiners*, 776 F.2d 530, 532 (5th Cir. 1986).

16 *Roe* v. *Abortion Abolition Society*, 811 F.2d 931, 933-936 (5th Cir. 1987) (rejected class of those who do not share the defendant's anti-abortion views based on religion; protected classes are rabe and possibly religion).

17 *McLean* v. *International Harvester Co.*, 817 F.2d 1214, 1218-1219 (5th Cir. 1987) (caution beyond race, but cited pre-*Scott* Fifth Circuit cases allowing classes of 1) immutable characteristic such as race, national origin or sex; and 2) political beliefs and associations).

18 *Mississippi Women's Medical Clinic* v. *McMillan*, 866 F.2d 788 (5th Cir. 1989) (class of "women of childbearing age who seek medical attention from the [plaintiff clinic]" was "so under-inclusive as to mischaracterize the dispute" and *did not* constitute a proper class. Insufficient "class-based invidiously discriminatory animus" as "the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions," including "men, women of all ages, doctors, nurses, staff, the female security guards, etc." *Id.* at 794-95. The Petitioners in the case at bar have this identical broad animus).

19 *Conklin* v. *Lovely*, 834 F.2d 543, 549 (6th Cir. 1987).

20 *Damato* v. *Wisconsin Gas Co.*, 760 F.2d 1474 (7th Cir. 1985) (rejecting class of handicapped, race only); *Grimes* v. *Smith*, 776 F.2d 1359 (7th Cir. 1985) (race only).

21 *Volk* v. *Koler*, 845 F.2d 1422, 1434 (7th Cir. 1988).

22 *Conroy* v. *Conroy*, 575 F.2d 175, 177 (8th Cir. 1978).

Ninth	Intra-Circuit Panel Conflict: 1) Race only;[23] 2) Sex;[24] and 3) Classes granted special protection by Congress or courts.[25]
Tenth	Restricted to race, in accordance with Congressional intent and this Court's decision in *Scott, supra.*[26]
Eleventh	Race alleged; issue at beyond race not reached[27]
D.C.	Race and Political affiliations with Racial overtones.[28]

The range of class-based animus currently extends from a strict adherence to race, all the way to women in general and especially women "abortion seekers". Of all the circuit courts, the Second Circuit, by its reasoning, has cast Section 1985(3) the furthest into uncharted waters:

> By its very language § 1985(3) is necessarily tied to *evolving notions of equality and citizenship.* As conspiracies directed against women are inherently invidious, and repugnant to the notion of equality of rights for all citizens, they are therefore encompassed under the Act. (Emphasis added) (A-40)

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23 *Gibson* v. *United States*, 781 F.2d 1334, 1341 (9th Cir. 1986) (race only); *National Abortion Federation* v. *Operation Rescue*, 721 F.Supp. 1168 (C.D.Cal. 1989) (rejecting "women seeking abortions").

24 *Reichard* v. *Life Ins. Co.*, 591 F.2d 499, 505 (9th Cir. 1979) (a class of women in general who purchase disability insurance); *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 712 F.Supp. 165, 169 (D.Or. 1989) (following *Reichard*, "women seeking abortions" approved).

25 *Schultz* v. *Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (beyond race if Congress or courts have given class special protections).

26 *Wilhelm* v. *Continental Title Co.*, 720 F.2d 1173, 1177 (10th Cir. 1983); *Brown* v. *Reardon*, 770 F.2d 896 (10th Cir. 1985).

27 *Brown* v. *Masonry Products, Inc.*, 874 F.2d 1476 (11th Cir. 1989). *Arnold* v. *Board of Educ. of Escambia County, Ala.*, 880 F.2d 305 (11th Cir. 1989).

28 *Hobson* v. *Wilson*, 737 F.2d 1, 21 (D.C. Cir. 1984); *Bois* v. *Marsh*, 801 F.2d 462 (D.C. Cir. 1986) (Open question beyond racial animus, but dissent would hold gender discrimination within Section 1985(3)).

Contrast this open-ended jurisprudence to the more prudent approach of the Tenth Circuit:

> In summary as to the *Scott* opinion, we find nothing therein to give any encouragement whatever to extend . . . [Section] 1985 to classes other than those involved in the strife in the South in 1871 with which congress was then concerned. In fact from *Scott* we get a signal that the classes covered by . . . [Section] 1985 should not be extended beyond those already expressly provided by the Court.[29]

Despite the cautions from this Court in *Griffin*[30] and *Scott*[31], the Second Circuit has brashly ignored the wisdom of limiting Section 1985(3). While giving lip service to Congressional intent and *Scott*, the Second Circuit has vastly extended the reach of this statute to protect almost any conceivable subgroup of the majority of the American population, recklessly opening a Pandora's Box of claims and claimants Congress never intended to be covered by the statute. *Wilhelm*, 720 F.2d at 1176; *Harrison*, 766 F.2d at 161. Combined with a broad reading of animus—defined as a "person's basic attitude or intention"—any subgroup of a generally protected class, regardless of its limit or description can now obtain Section 1985(3) relief, even though a conspiracy may only tangentially affect them. Section 1985(3) is thus transformed into the "general federal tort law" this Court warned against in *Scott*, 463 U.S. at 834.

Judge A. Wallace Tashima has cogently explained why this same class of "women seeking abortions is not a class intended to be protected by the Ku Klux Klan Act."[32]

> The Court disagrees with the proposition that any "particular [sub]class of women," *id.*, is a protected class.

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29 *Wilhelm* v. *Continental Title Co.*, 720 F.2d 1173, 1176 (10th Cir. 1983).

30 *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971).

31 *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott*, 463 U.S. 825 (1983).

32 *National Abortion Federation* v. *Operation Rescue*, 721 F.Supp. 1168, 1170 (C.D. Cal. 1989).

> For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, it separates persons of the same gender from each other and, obviously, on a basis other than by gender. *The inquiry*, thus, *must be made without respect to gender, i.e.*, it is the *"seeking abortion" trait which animates the defendants' actions* and must be the basis for making the . . . [Section 1985(3)] analysis.[33] (Emphasis added).

This "abortion seeker" rationale reflects the factual reality of Operation Rescue demonstrations. The general class of women the Second Circuit attempted to create had no relationship to the Petitioners' actions and should be rejected by this Court.

As this Court has held:

> [T]here must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.[34]

Petitioners respectfully urge this Court to define the parameters of "animus." Is it merely "a person's basic attitude or intention,"[35] or is it "ill-will" or "a prejudice against a group of persons or against a particular person because of his membership in that group"?[36] And should not "the class

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33 721 F.Supp. at 1171. In footnote 4 to this section, Judge Tashima notes the illogical extension of this argument. If women are a protected class, then all subclasses of women are protected. Likewise, if men are an unprotected class, then all subclasses of men are unprotected. "Therefore, *e.g.*, a class of homosexual women would be protected, but a class of homosexual men would not be." *Id.* at 1171 n.4.

34 *Griffin* v. *Breckenridge*, *supra*, 403 U.S. at 102.

35 *N.Y. State Nat. Organization for Women* v. *Terry*, *supra*, (A-42).

36 *Roe* v. *Abortion Abolition Society*, 811 F.2d 931, 934 (5th Cir. 1987).

animus alleged be consistent with the deprivation of rights alleged."[37] The Petitioners submit that the animus or motivation of the conspiracy, *i.e.*, "those at whom the conspiracy was aimed" is the proper interpretation.[38]

In this case not only is the class of "women seeking abortions" inappropriate, but the alleged "animus" against them is wholesale fiction. Truth has come full circle where peaceful non-violent pro-life demonstrators, many of whom are praying for abortion seekers, are charged with animus against women similar to the Ku Klux Klan's hatred of Blacks and their supporters. Not only is the parallel wholly lacking, the application of the Ku Klux Klan Act against them is an unprincipled legal fiction of technical form and only serves to keep the federal courts embroiled in abortion litigation in the Post-*Webster* era in a manner that was not intended by Congress.[39]

II. The Second Circuit Erroneously Held That Brief Non-Violent Sit-In Demonstrations on Public Sidewalks Implicate The Right to Travel.

Relying on a holding from *Doe* v. *Bolton*, 410 U.S. 179, 200 (1973), that State residency requirements for abortions are inconsistent with the Privileges and Immunities Clause, together with a reference to the right against private discrimination created by the Supreme Court in *Griffin* v. *Breckenridge*, 403 U.S. 88, 105-06 (1971), the Second Circuit concluded that the Petitioners' sit-in demonstrations on public sidewalks have denied the Respondents' constitutional Right to Travel (A-43 to 44).

As a threshold matter, there is no Right to Travel case factually analogous to Rescue demonstrations of the type involved in this case. Such decisions involve infringement of the Right to Travel by state action, principally through dis-

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37 *Lopez* v. *Arrowhead Ranches*, 523 F.2d 924, 928 (9th Cir. 1975).

38 *Mississippi Womens' Medical Center* v. *McMillan*, 866 F.2d 788, 794 (5th Cir. 1989).

39 *Webster* v. *Reproductive Health Services*, 492 U.S. _____, 106 L.Ed.2d 410 (1989).

criminatory residency requirements.[40] The Right to Travel in its classic meaning ensures new residents the same right to *vital governmental benefits and privileges* in the states to which they migrate as they are enjoyed by other residents. *Califano* v. *Gautier Torres*, 435 U.S. 1 (1978).

In analyzing Rescue demonstrations, Judge Tashima has commented: "Whatever other legal rights and liabilities may be implicated by such conduct, there is no federal privilege or immunity of one class of persons not to have another class of persons engage in non-violent, civil disobedience."[41]

In the present case, Respondents did not draw any evidence of denial of the Right to Travel to any specific identifiable women. The case rests solely on the *generalized* allegation of *possible* impacts on some women who *may* perceive some difficulty in obtaining an abortion in another jurisdiction. Furthermore, it is clear that out-of-state abortion seekers are treated no differently than those in the State of New York.

Under the decision of the Second Circuit, even if the constitutional right to an abortion is reversed, Section 1985(3) and the Right to Travel will become the vehicle not only for a continuing onslaught of future abortion litigation but for use against every other minority movement that espouses unpopular positions. The federal courts will be even further embroiled, this time as "the monitors of . . . [anti-abortion demonstration] tactics" rather than "campaign tactics," the very situation this Court wisely avoided seven years ago.[42]

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40 *See e.g.*, *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). *Attorney General of New York* v. *Soto-Lopez*, 476 U.S. 898 (1986).

41 *National Abortion Federation* v. *Operation Rescue*, No. CV 89-1181 (AWT) slip op. at 7 (C.D. Cal. January 31, 1990) (dismissing amended complaint with prejudice).

42 *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott*, *supra* 463 U.S. at 836 (emphasis added). This Court was so clear in *Griffin* that the Ku Klux Klan Act was never "intended to apply to all tortious, conspiratorial interferences with the rights of others." *Griffin* v. *Breckenridge*, *supra* 403 U.S. at 101. *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott*, *supra*, 463 U.S. at 834.

The contention that non-violent sit-in demonstrations on public sidewalks involving hundreds of volunteers of conscience, gathering to protest abortion, rises to a purposeful constitutional violation of the interstate Right to Travel, is nothing short of constitutional ambrosia—the creation of a Federal cause of action where none exists.

III. The Second Circuit Erroneously Held That The Contempt Fines Imposed by The District Court Were Civil in Nature

On October 27, 1988, the district court held the Petitioner Randall Terry and Operation Rescue in contempt, ruling on motion papers and denying the Petitioners' request for a hearing or even an oral argument (A-78 to 103). The Petitioners submit that the unconditional imposition of the $50,000 ($25,000/day, originally payable to Respondent N.O.W. and modified by the panel to be payable to the United States) and $19,141 (payable to the City of New York for police overtime for failure to give 12 hours advance notice of the exact location of the demonstration) fines made the contempts criminal in nature, since there was no purge mechanism available to the Petitioners to comply with and escape the sanctions (A-104 to 108).

The panel reasoned that since the district court added the $25,000 sanction to its injunction *before* the Petitioners violated the TRO, the Petitioners' opportunity to comply necessarily came at that initial point (A-22 to 23). This rationale cannot be reconciled with the settled contempt jurisprudence of this Court. A recent decision of this Court summarized a century's worth of this Court's settled contempt jurisprudence:

> *If the relief provided is a fine*, it is remedial when it is paid to the complainant, and *punitive when it is paid to the court*, though a fine that would be payable to the court is also remedial when the petitioner *can avoid paying* the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that *criminal penalties may not be imposed on someone who has not been*

> *afforded the protections that the Constitution* requires of such criminal proceedings, . . . An *unconstitutional penalty is criminal in nature because it is "solely and exclusively punitive in character." Penfield Co.* v. *SEC*, 300 U.S. 585, 593, 67 S.Ct. 918, 922 91 L.Ed. 1117 (1947). • • • This Court ruled that since the man was not tried in a proceeding that afforded him the applicable constitutional protections, he could be given a conditional term of imprisonment *but could not be made to pay 'a flat, unconditional fine* of $50.00." *Penfield, supra.*

Hicks on Behalf of Feiock v. *Feiock*, 485 U.S. 624, 632-33 (1988) (citations omitted) (emphasis added). The unconditional and punitive nature of the $50,000 and $19,141 fines are manifest.

The fact that the lower courts have conveniently denominated their penalty "civil coercive contempt" (A-22 to 23) is not controlling and should not be allowed to defeat applicable protections of federal constitutional law. *Hicks* v. *Feiock*, *supra*, 485 U.S. at 631. The unconditional character of the court's contempt orders made the contempt criminal. Since none of the due process protections, required in criminal proceedings, were afforded Petitioners Randall Terry and Operation Rescue, the contempt judgments must be reversed. *Young* v. *U.S. Ex Rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 798-99 (1987).

In the decision below, the Second Circuit stated "[a]bsent the threat of imprisonment, the Constitutional due process protections generally are not required in a civil contempt proceeding." (A-21) This analysis reveals the unorthodox view that due process protections are generally inapplicable to situations involving monetary sanctions. Nothing could be further from this Court's jurisprudence.[43]

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43 *Penfield* v. *Securities & Exchange Commission*, 330 U.S. 585, 592-595 (1947) (an unconditional $50.00 fine was a criminal sanction), *Union Tool* v. *Wilson*, 259 U.S. 107, 110 (1922), (a $2,500 fine payable to the court was a criminal sanction); *Nye* v. *United States*, 313 U.S. 33, 34 (1941) (unconditional fines payable to the United States carry the criminal hallmark); *Hicks* v. *Feiock*, *supra*.

Regarding unconditional versus conditional sanctions, this Court has often stated that a civil contempt sanction must have a mechanism whereby the contemnor can subsequently comply with the court's order and thereby purge himself of the contempt. *See*, *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966); *Hicks* v. *Feiock*, *supra*; *Penfield* v. *Securities & Exchange Commission*, *supra*. On December 9, 1988 and November 3, 1988, when unconditional contempt judgments and fines against the Petitioners were entered, there was nothing the Petitioners could have done to purge themselves of the contempt (A-104-105, 107-108). The judgments were, therefore, *ipso facto*, criminal in nature.

The criminal nature of the contempt judgments is revealed by their punitive quality (to vindicate the authority of the court), and not as "remedial, and for the benefit of the complainant." *Gompers* v. *Buck's Stove & Range*, 221 U.S. 418, 441 (1911). The Second Circuit's decision is replete with pejorative references to the Petitioners' purported defiance (A-21 to 26). The fact that the Second Circuit modified the November 3, 1988 $50,000 Judgment to be payable to the court (the United States) and not to the private Respondent N.O.W., makes the judgment more clearly punitive in nature and not remedial and for the benefit of the complainant. Moreover, the fines are clearly "intended as a deterrent to offenses against the public"[44] and "to punish the act of disobedience as a public wrong."[45]

The Second Circuit's holding that the petitioners' opportunity to comply with the order came *before* a violation occurred only manifests, in a *tour de force* manner, the pejorative comments of Justice O'Connor in *Thornburgh*, *supra*. The purge mechanism doctrine comes into play *after* a party is adjudged in contempt, so that the sanction is imposed *with conditions* which allow the contemnor to escape the sanction by compliance with the order. This case involves, however, violations of orders to refrain from prohibited action which

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44 *Nye*, *supra*, 313 U.S. at 42. See Second Circuit discussion at A-51 (public health and safety at risk).

45 *Michaelson* v. *United States*, 266 U.S. 42, 65 (1924).

cannot be purged; the only appropriate response of a court is to punish past conduct, which is classic criminal contempt.[46]

These conditionality and purge mechanism requirements for civil contempt have been uniformly followed by other circuit courts,[47] as well as other Second Circuit decisions.[48] Apparently then, the only reason they were not applied here is the grim reality that in cases involving abortion, "a permissible reading of the [law] is to be avoided at all costs." *Thornburgh*, *supra* 476 U.S. at 812 (White, J., dissenting).

IV. The Petitioners Have Been Denied A Fair Trial on Constitutional Issues

The preemptive summary judgment upheld by the Second Circuit has denied the Petitioners an opportunity for a complete hearing with discovery on the complex factual and constitutional issues in this case, dealing with the Right to Travel, the First Amendment, the defense of "necessity" to protect human life, and the right to privacy-abortion. Other than a limited hearing with regard to issuance of a preliminary injunction, held on October 25 and 27, 1988, the trial court has effectively denied the Petitioners a full evidentiary hearing on the permanent injunction, and has tried the case and rendered judgment in favor of the Respondents on the basis of mere affidavits presented by Respondents' employees, which are flawed by hearsay and legal conclusions (A-192 to 203). Because genuine issues of material fact remain

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46 *See also*, *Crozer-Chester Medical Center* v. *Moran*, 560 A.2d 133 (Pa. 1989) (contempt against anti-abortion protester adjudged to be criminal).

47 *Douglas* v. *First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1971); *United States* v. *Miller*, 540 F.2d 1213 (4th Cir. 1976); *United States* v. *Spectro Foods*, 544 F.2d 1175 (3rd Cir. 1976); *United States* v. *North*, 621 F.2d 1255 (3rd Cir. 1980); *In re: Stewart*, 571 F.2d 958 (5th Cir. 1978); *Falstaff* v. *Miller*, 702 F.2d 770 (9th Cir. 1983).

48 *In Re Grand Jury Witness*, 835 F.2d 437, 442 (2d Cir. 1987) *cert. denied sub nom. Arambulo* v. *United States*, 485 U.S. 1039 (1988) (stating a $50,000 fine was clearly criminal contempt); *U.S.* v. *Ayers*, 866 F.2d 571 (2nd Cir. 1989) (determinate sentence vacated because of absence of purge mechanism); *Hess* v. *New Jersey Transit Rail Operations, Inc.*, 946 F.2d 114 (2d Cir. 1988) (unconditional fine vacated).

unresolved, the district court's action, as affirmed by the circuit court, therefore, *conflicts* with existing authority and decisions of this Court.

In its summary judgment decision, the district court noted the Petitioners were not entitled to further discovery because they had "presented no evidence in their papers opposing summary judgment that would bring into question the undisputed facts on the record." (A-137 n.17) This reasoning is inexplicably narrow, in view of the fact that at the hearing of October 25 and 27, the Petitioners—despite their strenuous objection—were required by the court to put their witness and evidence on *first*, in response to the bare allegations contained in Respondents' supporting affidavits. (A-281 to 285) Petitioners' witnesses, point by point, refuted the Respondents' affidavits at that hearing (Dr. Bernard Nathanson (medical) at A-204 to 225 and Dr. Stephanie O'Callaghan (psychological and emotional) at 237 to 250). In spite of this clear factual conflict, the lower court has refused the Petitioners a reasonable opportunity to conduct discovery. *See*, Respondents' Complaint at ¶ 42 (A-164); Petitioners' Answers at ¶ 42 and ¶ 63 (A-180, 182, 188, 190).

Constitutional questions and issues of public importance should be decided only with a properly developed factual predicate, and "where the record is inadequate for the constitutional question presented or there are genuine factual issues, a motion for summary judgment should be denied." 6(2) J. Moore, *Moores Federal Practice* Sec. 56.17(10) (1988). *See*, *Board of Education, Island Trees Union Free School District No. 26* v. *Pico*, 457 U.S. 853 (1982). In *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), involving questions as to motive and intent, this Court said that "[t]rial by affidavit is no substitute for trial by jury which has so long been the hallmark of 'even handed justice.' " *White Motor Company* v. *United States*, 372 U.S. 253, 259 (1963). *See also*, *Motown Record Corp.* v. *Mary Jane Girls, Inc.*, 118 F.R.D. 35, 37 (S.D.N.Y. 1987).[49]

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49 In *Donahue* v. *Windsor Locks Bd. of Fire Com'rs.*, 834 F.2d 54, 58 (2d Cir. 1987), dealing with a 42 U.S.C. Sec. 1983 action involving alleged Freedom of Speech violations, Judge Kaufman, speaking for the panel,

Petitioners' intent in conducting the demonstrations in this case has been to protest abortion, to defend unborn human life and to advise and protect mothers concerning the immediate and long term consequences of abortion. This intent was directly at issue below—indeed, a finding of class-based animus was critical to upholding federal jurisdiction over Respondents' claims. *N.Y. State Nat. Organization for Women* v. *Terry* (A-41 to 43). The Petitioners, however, have been denied a full hearing in contravention of the holding in *Poller*, *supra*, and following cases.

The Petitioners' threshold evidence presented at the preliminary hearing on October 25 and 27, 1988, in the testimony of Dr. Nathanson and Dr. O'Callaghan, (A-204 to 250) refuted in detail the claims of the Respondents' supporting affidavits regarding endangerment of the mothers' health and demonstrated that "genuine issue(s) of material fact" remained for discovery and trial. *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). Despite the existence of disputed issues of "material fact," the district court entered summary judgment in favor of the Respondents. This is impermissible, for as this Court has recently stated: "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).[50]

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noted that summary judgment must "be used selectively to avoid trial by affidavit." (citing *Judge* v. *City of Buffalo*, 524 F.2d 1321 (2d Cir. 1975). *See also*, *City of Los Angeles* v. *Preferred Communications*, 476 U.S. 480 (1986) (reversing a dismissal because of inadequate record for First Amendment claims).

50 Similarly, the Second Circuit has observed that upon motion for summary judgment, a court " 'cannot try issues of fact; it can only determine whether there are issues to be tried.' " *Donahue* v. *Windsor Locks Bd. of Fire Com'rs.*, 834 at 58. "When the Court considers a summary judgment motion, it must draw all reasonable inferences and resolve all ambiguities in favor of the non-moving party." *Garza* v. *Marine Transport Lines, Inc.*, 871 F.2d 23, 26 (2d Cir. 1988); *City of Yonkers* v. *Otis Elevator Co.*, 844 F.2d 42, 45 (2d Cir. 1988).

Equally important, the district court has prematurely decided "serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness." *Thornburgh* v. *American Coll. of Obst. and Gyn.*, 476 U.S. 747, 815. (O'Connor, J., dissenting). The Petitioners have been summarily denied the opportunity to properly and fully present their case and, in particular to refute the Respondents' generalized and unsupported claims that the right to abortion is unduly burdened, or that the Right to Travel is abridged, let alone adversely affected, by Petitioners' Rescue activities.

The constitutional and factual questions of this case deserve a full trial and scrutiny under the discovery process. To do otherwise, would deny the Petitioners a fair adjudication, establishing a pattern of truncated, *pro forma* summary judgments for a "special" class of cases in which abortion is challenged as a matter of fact or law.

V. Petitioners' First Amendment Rights Have Been Violated By Court Orders That Imposed Unlawful Prior Restraint of Protected Speech

Petitioners' practice of non-violent sit-ins and protests is aimed at temporarily closing the entrance of abortion centers and passively demonstrating, including displaying placards, wearing armbands, counseling, persuading, singing and praying.

Operation Rescue volunteers, as a matter of conscience and deeply held personal conviction, seek to directly save the life of unborn children scheduled for abortion and to turn the heart of the nation, its legislators and jurists away from the practice of abortion on demand, through legislation and legal decisions. (A-256 to 280)

Operation Rescue specifically directs its participants in writing that all demonstrations will be peaceful and passive in nature, and requires each demonstrator to sign a pledge of non-violence. (A-257 to 258, 270 to 271) Rescues conducted in the New York City area have in fact been non-violent and peaceful.

Although under existing Supreme Court decisions, the non-violent activity of temporarily blocking entry to an abortion center is not of itself protected by the First Amendment, *Adderly* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *Louisiana*, 379 U.S. 536 (1965), the peaceful presence of demonstrators, the display of placards, and other demonstration activities such as singing, prayer, counseling and vocal persuasion, fall directly within the ambit of activity historically protected by the First Amendment. *E.g.*, *Hague* v. *CIO*, 307 U.S. 496 (1939); *United States* v. *Grace*, 461 U.S. 171 (1983); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963). The question which arises in this case is: Shall public demonstrations containing elements of civil disobedience or individual acts of civil disobedience for political purposes be treated in all aspects as non-expressive conduct, deserving no First Amendment safeguards whatsoever? The reach of constitutional constraints, *if any*, on court or police action in regard to demonstrations such as Operation Rescue which include expressive conduct and non-violent acts of civil disobedience, will turn on this issue.

A. Coercive Fines, Content Discrimination And Prior Restraint

In proceedings below, the district court has issued injunctions and penalties, striking at the political content of Petitioners' message, chilling the First Amendment arena with broad restraints, buttressed by huge fines. On May 4, 1988, attorneys for Respondents and Petitioners herein appeared before the Honorable Robert J. Ward, U.S.D.J. Southern District of New York, to argue a show cause for violation of a TRO against Petitioners' sit-in demonstrations at New York City abortion clinics (during the period of May 1-6, 1988) originally entered by the Supreme Court of the State of New York on April 28, 1988. Without hearing evidence of irreparable harm, Judge Ward adopted the Temporary Restraining Order issued against Petitioners by the New York State Court, and additionally modified it by adding a prospective $25,000 per day fine for violation of the TRO provisions,

together with costs expended by the City of New York for police presence at the demonstrations. (A-53 to 55)

In discussing disposition of a potential coercive fine imposed for violation of the TRO, Judge Ward, *without* request from the Respondents, indicated that he was planning ultimately to have the fine paid to the Respondents. The following exchange of remarks occurred:

> MR. COLE: [for the Respondents] "Well no, it is for the purpose of coercing compliance. If $25,000 doesn't work, then it is appropriate to increase the penalty. However, my understanding is that that penalty goes to the Court, not to Respondents."
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> THE COURT: "Oh, no. The way I understand this business of coercion is that I can direct the penalty to be paid in any way I deem appropriate. Partly, I would suggest, I would be considering that the penalty be paid in such a way as to encourage compliance. I think if I may say so, the most effective way to do that would be to direct that the payments be made to the Respondent or Respondents. I don't think that is something that the petitioners would be happy with, but *I would certainly suggest that if I were made to pay someone who I considered my—, I won't say enemy, I won't say that—a person who has a different point of view who might then use the money to buy advertising space and do other things to counter-attack my attack, I think the whole thing might turn into a rather interesting political exercise. But that is for another day.* (emphasis added)

By court opinion dated October 27, 1988, Judge Ward found Petitioners Randall Terry and Operation Rescue to be in Civil Contempt of the Court's May 5th Order for demonstrations held on May 5th and 6th, 1988 and assessed a penalty of $50,000, which was ordered to be "paid to plaintiff National Organization of Women and disbursed among the remaining respondents according to its discretion." (A-104)[51]

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51 The district court additionally found Petitioners Terry and Operation Rescue liable to pay City of New York excess police costs, and subsequently ordered $19,141 to be paid by Petitioners. (A-106 to 108)

In the first instance, as subsequently held by the circuit court on appeal in this case, the district court had no authority to order coercive penalties to be paid to the Respondents. (A-27 to 29). The penalties in this case were unequivocally identified as "coercive". More importantly, the Judge's remarks on May 4th reveal with astounding clarity the court's intention to punish and coerce the Petitioners by making money available to Respondents *for the express purpose of opposing and "counterattacking" Petitioners' political beliefs*. No case, no principle of law, can support an implicitly intentional court use of the system of justice to undermine or resist the Petitioners' First Amendment cause, in order to coerce behavior. Cases regarding impermissible government discrimination against the content of First Amendment speech activity underscore this tenet.[52]

It is particularly egregious that in providing $25,000 daily fines, the court made no substantial inquiry into the financial ability of the *individual Operation Rescue participants* to pay such fines, although the court's order and threatened fines applied to every participant with actual notice. In *Dole Fresh Fruit Co.* v. *United Banana Co., Inc.*, 821 F.2d 106, 110 (2d Cir. 1987), the Second Circuit held that before imposing coercive penalties a trial court must explicitly consider (1) the character and magnitude of the harm threatened by the continued contumacy; (2) the probable effectiveness of any suggested sanction in bringing about compliance; and (3) the contemnor's financial resources and consequent seriousness of the burden of the sanction upon him."[53] In this case the court was advised that counsel believed that Petitioner Terry was essentially without funds.

But, the district court, without considering this or evaluating the other applicable standards, insisted upon levying a severe coercive penalty that ignored *the chilling effect of the*

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52 *Police Department* v. *Mosley*, 408 U.S. 92 (1972); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981); *Erznoznik* v. *Jacksonville*, 422 U.S. 205 (1975); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

53 *But see, United States* v. *Ruggiero*, 835 F.2d 443 (2d Cir. 1987) (defense attorney's silence in regard to petitioner's financial resources).

generally publicized $25,000 daily fine upon certain clearly protected First Amendment demonstration activities.[54]

Although Respondents ingeneously urged, and the district court went on to hold, that the highly trained and experienced New York Police Department could not cope with the Rescue demonstrations (thereby justifying the imposition of $25,000 penalties on demonstrators), the record is clear that New York Police Department, after viewing videotapes of similar Rescue sit-ins, had advised a New York State court that they were quite able to handle such demonstrations.[55]

In *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175, 180-181 (1968), where an *ex parte* restraining order had been issued by a state court, prohibiting further rallies of a

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54 In the contempt opinion of October 27th herein, the district court recited the requirements of *Dole Fresh Fruit Co., supra*, but failed however, to give specific consideration to part (1) or (2) thereof and only briefly referred to the TRO Hearing of May 4th in regard to part (3). At a further hearing conducted on May 6, 1988, Judge Ward stated: "I was well aware that the TRO was not likely to stop a group as committed as this one. Indeed, it did not. So I used what I thought was reasonable judgment." The implication of these facts in regard to part (2) of the *Dole Fresh Fruit Co., supra*, requirements and in light of potential criminal charges clearly facing demonstrators for obstructing entrance to abortion clinics, point to an excessive, ineffective penalty, punishing Rescue participants acting as a matter of conscience to protest abortion and save human life. Judge Ward's tacit solicitation from Respondents that jail penalties should not be imposed, to avoid creating "martyrs," points directly to the Court's not insignificant concern with First Amendment implications of Petitioners' demonstrations, rather than applying a reasonable penalty to coerce behavior.

55 When considering a similar case where a TRO was being sought against Operation Rescue demonstrations planned in the Boston area, the United States Court of Appeals for the First Circuit *denied* the appeal of a lower court ruling against granting a preliminary injunction, indicating that the Massachusetts authorities and police could be expected to properly safeguard the rights of the Appellants and their patients. Upon a renewed motion for a temporary restraining order, after Operation Rescue demonstrations in Boston, the district court in this case again refused the requested injunction. *Planned Parenthood* v. *Operation Rescue*, Civil Action No. 88-2329-NA (D.Mass. October 19, 1988); *Planned Parenthood* v. *Operation Rescue*, Appeal No. 88-2047 (1st Cir. October 21, 1988); *Planned Parenthood* v. *Operation Rescue*, Civil Action No. 88-2329-MA (D.Mass. October 26, 1988).

"white supremacist" organization, the Supreme Court observed that:

> Ordinarily the states' constitutionally permissible interests are adequately served by *criminal penalties* imposed *after* freedom to speak has been so grossly abused that its immunity is breached. *The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint.* (Emphasis added.)

The lower courts herein had a more than reasonable basis to allow New York City authorities to enforce the law and seek criminal penalties as necessary with regard to Rescue demonstrations—as the First Circuit has decisively chosen to do. Instead, they departed from the presumption protecting political protest and the exercise of the First Amendment and imposed a severe regime of prior restraint that impermissibly chilled political protest. *The inevitable effect of the $25,000 daily fines has been reinforced by the district court's recent imposition of a total of $450,000 in new fines against 10 individuals for injunction violations, including $100,000 additional fines against Randall Terry and Operation Rescue. N.Y. State Nat. Organization for Women* v. *Terry*, No. 88 Civ. 3071, slip op. at 53-54 (S.D.N.Y. Feb. 27, 1990).

Reporting on implications of the court's decision, the New York Times noted that, "Lawyers for the National Organization for Women, as well as some of the protestors, said that potential demonstrators might be deterred from participating in demonstrations because they could be held personally liable," " 'It's a warning to individuals," said Mary G. Gundrum, an attorney at the Center for Constitutional Rights who represented N.O.W. and several clinics . . . "*Individuals are now put on notice that if they choose to participate, they will be personally liable.*' " *The New York Times*, Feb. 28, 1990, B1, col. 5. (emphasis added)

In *Spallone* v. *United States*, ____ U.S. ____ 58 U.S.L.W. 4103, 4105 (1990), this Court stated the ancient maxim in regard to coercive sanctions that "a court must exercise [t]he *least possible power* adequate to the end proposed." Quoting *Anderson* v. *Dunn*, 6 WHEAT (19 U.S.) 204, 231 (1821). "[A]

district Court, in exercising the awesome power of contempt, must turn square corners." *United States* v. *Edgerton*, 734 F.2d 913, 915 (2d Cir. 1984). "When First Amendment rights are involved we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966).

In *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, 390 (1973), dealing with prior restraint of advertisement, the Court characterized the effect of such conduct, stating that "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by *inducing excessive caution in the speaker* before an adequate determination that it is unprotected by the First Amendment." (emphasis added) *See also*, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963).

In this regard, the enormously disproportionate fines employed by the lower court herein are on their face and as applied, unconstitutional, bearing no reasonable relationship to the meager, unsubstantiated evidence of alleged harm, in the face of broad First Amendment implications of Rescue demonstrations.

B. The *O'Brien* Standard and *Spence* v. *Washington*

In *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968), it was said: "This Court has held that when 'speech' and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." The Court continued, explaining its reasoning:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] *if the governmental interest is unrelated to the suppression of free expression*; [4] *and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of that interest*. 391 U.S. at 377. (emphasis added).

In light of the trial court's express and implied intention regarding the political content of Petitioners' First Amendment activities, and the plainly excess, unjustified nature of fines imposed against Petitioners, it is evident that the court's actions fail the latter two requirements set forth in *O'Brien*.

The Supreme Court has further held:

> "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.' "

Texas v. *Johnson*, 491 U.S. ____, 109 S.Ct. 2533, 2539 (1989), quoting *Spence* v. *Washington*, 418 U.S. 405, 410-411 (1974).

Rescue demonstrations only temporarily block entrance to abortion clinics and cannot in their own right save the lives of more than a few unborn children. (A-256 to 280) *The "expressive" component of these demonstrations is nevertheless great.* They include picketing, posters, singing, counseling and prayer, as well as a cumulative message to the world that the evil of abortion should be arrested. The question arises: Shall public demonstrations containing elements of civil disobedience or individual acts of civil disobedience for political purposes, be treated in all aspects as non-expressive conduct, deserving no First Amendment safeguards whatsoever?

The Petitioners respectfully submit that minimal protections under the First, Fifth and Fourteenth Amendments require an articulable standard of reasonableness in measuring sanctions against individuals who participate in Rescue demonstrations, particularly in light of the availability of state criminal enforcement and civil damages. Before assessing sanctions in dealing with public demonstrations containing elements of civil disobedience for political purposes, the court should give explicit consideration to the following suggested criteria:

- The character and extent of expressive conduct falling within First Amendment protection

- The probable impact of sanctions on First Amendment demonstration activity
- The probable effectiveness of suggested sanctions in bringing about compliance which cannot be achieved by normal criminal sanctions and civil remedies.

See also, United States v. *O'Brien*, *supra*, 391 U.S. at 376; *Dole Fresh Fruit Co.* v. *United Banana Co., Inc.*, *supra* at 110.

VI. The Second Circuit Erred In Conferring Article III Standing on the Respondents and Respondent-Intervenor

The Petitioners have asserted, from inception, that the Respondents have no Article III standing to maintain this action, nor seek the class-wide injunctive relief that they have been granted, as the Respodnents have utterly failed to plead or produce evidence of Article III direct injury. *Los Angeles* v. *Lyons*, 461 U.S. 95, 102-103 (1983). *See*, *Roe* v. *Operation Rescue*, No. 88-5157, slip. op. (E.D. Pa., December 19, 1988). The respondents fail to meet the required standards for organizational or representative standing, as the claim asserted "requires the participation of individual members in the lawsuit," and the necessary proof can not be presented "in a group context." *New York State Club Association* v. *City of New York*, 487 U.S. 1, ____ n.4 (1988).

The complaint filed by the City does not contain the requisite allegations of a "personal stake" in the outcome of the litigation. *See*, *City of Milwaukee* v. *Saxbe*, 546 F.2d 693, 698 (7th Cir. 1976) ("Unless the City has alleged an injury to itself, it can establish standing only as a representative of its citizens who have been injured in fact.") *See also*, *Rizzo* v. *Goode*, 423 U.S. 362, 371-73 (1976). In the absence of standing, the City had no right to invoke the district court's remedial powers and its purported pendant party claim should have been dismissed.[56] *Finley* v. *United States*, ____ U.S. ____, 109 S.Ct. 2003 (1989).

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56 *See*, *Prince George's County, Maryland* v. *Levi*, 79 F.R.D. 1, 5 (D.Md. 1977); *Commonwealth of Pa. ex. rel. Rafferty* v. *Philadelphia Psychiatric Center*, 356 F.Supp. 500 (E.D. Pa. 1973).

VII. The Second Circuit's Awards of Cost Under Rule 37(A)(4) Jointly And Severally Against Petitioners And Their Counsel Was Arbitrary And An Abuse Of Discretion

As the district court recited in its August 31, 1988, Order, the discovery sought by Respondents and by intervenor City of New York from Petitioners Terry and "Operation Rescue" was "in connection with their then pending contempt motion" (A-57). The discovery on its face seriously implicated Mr. Terry's Rights to Freedom of Speech, Freedom of Association, Freedom of Religion and Personal Privacy, guaranteed by the First, Fourth and Fourteenth Amendments, and his Privilege Against Self-Incrimination, guaranteed by the Fifth Amendment. Petitioners opposed Respondents' motion to compel and sought a protective order in order to preserve Mr. Terry's constitutional Rights and Privileges and to permit Petitioners to obtain a ruling on whether the Court had Article III jurisdiction before subjecting Mr. Terry, who was not sued as a party in his personal capacity, to merits discovery. Petitioners also sought to prevent respondents from using the fruits of such discovery in other actions they had brought or threatened to bring against petitioners.

The district court declined to follow this Court's decision in *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) and summarily rejected Petitioners' request for a protective order. The court also impermissibly narrowed the constitutional protections afforded to citizens engaged in non-violent civil disobedience and public advocacy of unpopular but deeply held religious, political and moral convictions and penalized Petitioners for their attempt to assert their constitutional Rights and Privileges. Finally, the court arbitrarily imposed sanctions upon attorneys engaged in *pro bono* representation of such dissenters, thereby threatening to discourage members of the federal bar from fulfilling their professional ethical obligation to provide vigorous and fearless defense to citizens who espouse unpopular causes and seek by their protests to chal-

lenge the failure of government to remedy what they believe to be a pernicious and inhuman injustice.

The district court's imposition of costs was particularly inappropriate here because it was imposed jointly and severally on Petitioners *and their counsel.* The district court's rationale affirmed by the Second Circuit, for this extraordinary discovery sanction is that "Terry invoked privileges almost entirely on advice from his counsel." (A-36). According to Professor Moore,

> "expenses should be charged to the attorney only if the failure to make discovery was principally at his instigation." 4A J. Moore, *Federal Practice* ¶ 37,02 [10.-4] (2d ed. 1988).[57]

As the court of appeals noted in *Weisberg* v. *Webster*, 749 F.2d 864, 873-74 (D.C. Cir. 1984), even where the imposition of costs under Fed.R.Civ.P. 37(a)(4) on a party may be justified, it does not automatically follow that it is proper to impose costs on that party's attorney. Rather, specific findings of *separate grounds* are required to sustain the imposition of costs on the attorney:

> "This requirement of findings to support an award of expenses against an attorney is prompted by the structure of Rule 37, by concerns for effective appellate review, and by concerns for the tension created in the attorney-client relationship when the attorney is subject to personal liability."

Id. at 874.[58]

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57 *See also, Crawford* v. *American Federation of Government Employees*, 576 F.Supp. 812, 815 (D.D.C. 1983) ("an award ought to be made against the attorney only when it is clear that discovery was unjustifiably opposed principally at his instigation"); *Humphreys Exterminating Co.* v. *Poulter*, 62 F.R.D. 392, 395 (D. Md. 1974); *Hulvat* v. *Royal Indemnity Co.*, 277 F.Supp. 769, 771 (E.D. Wis. 1967).

58 *See also, Reygo Pacific Corp.* v. *Johnston Pump Co.*, 680 F.2d 647, 649 (9th Cir. 1982); *Stillman* v. *Edmund Scientific Co.*, 522 F.2d 798, 801 (4th Cir. 1975); *1970 Advisory Committee Note to Rule 37(a)(4)*, quoted in 4A J. Moore, *Federal Practice* ¶ 37.01 [8], pp. 37-22 to 23 (2d ed. 1988).

Moreover, where there is a legitimate dispute as to the propriety of discovery with First and Fifth Amendment implications, effective representation by counsel requires that discovery disputes be brought to the court for resolution and opposition to a motion to compel in those circumstances should be presumed to be substantially justified. *See*, *Pierce* v. *Underwood*, 487 U.S. 552 (1988). Therefore, imposition of costs on petitioners *and their counsel* here was an unwarranted abuse of discretion. *See*, *e.g.*, *Spevack* v. *Klein*, 385 U.S. 511 (1967) (prohibiting "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' ")

CONCLUSION

It is respectfully submitted that Petitioners' petition for certiorari should be granted and that the issues raised therein should be addressed by the justices of this Court.

Dated: March 5, 1990
New York, New York

Respectfully submitted,

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APPENDIX D

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FLORENCE TALLUTO, ET AL.,

Petitioners,

- v. -

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Do "women seeking abortions" constitute a valid class for purposes of "class animus" requirement of 42 U.S.C. section 1985(3)?

II. Is opposition to abortion *per se* discrimination against women for purposes of "class animus" requirement of 42 U.S.C. section 1985(3)?

III. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?

IV. Are Respondents' claims under 42 U.S.C. section 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?

OPINIONS BELOW

The opinion of the court of appeals (set forth at pages A-1 to 52 of the Appendix to this Petition) is reported at 886 F.2d 1339 (2d Cir. 1989). The district court opinion on discovery and sanctions is unreported (set forth at pages A-56 to 74 of the Appendix). The district court opinion on contempt (set forth at pages A-78 to 103 of the Appendix) is reported at 697 F.Supp. 1324 (S.D.N.Y. 1988). The district court summary judgment opinion (set forth at page A-115 to A-143 of the Appendix) is reported at 704 F.Supp. 1247 (S.D.N.Y. 1989).

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1989 (A-151 to 152). The order of the court of appeals denying the petition for rehearing *en banc* was entered on November 7, 1989 (A-147 to 148). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). A timely motion for extention of time to file this petition to March 5, 1990, was granted by Mr. Justice Marshall on January 29, 1990, Application No. 89-534.

STATUTORY PROVISIONS

Section 1985(3) of Title 42 of the United States Code ("Section 1985(3)") is set forth at page A-153 to 154 of the Appendix.

STATEMENT OF THE CASE

The decision of the Second Circuit affirming with one modification five judgments and orders of the district court has created an unprecedented body of rulings in clear contradiction of binding precedents of this Court. Given the ongoing national debate over abortion and the First Amendment implications of the panel's opinion, Petitioners respectfully submit that the vital issues raised in this appeal should be addressed by this Court.

PARTIES

The Petitioners are as follows: Florence Talluto, Reverend Robert Pearson, Reverend Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, Michael LaPenna and Christopher Slattery.

The Petitioners were each non-party contempt respondents in the district court and appellants in the court of appeals. The following were defendants in the district court and were appellants in the court of appeals but are not presently Petitioners: Randall A. Terry, Operation Rescue and Thomas Herlihy. Non-party contempt respondent B.O.R.N. is also not a Petitioner. Contempt was not sought against defendant Reverend James P. Lisante.

The Respondents are as follows: Planned Parenthood Margaret Sanger Clinic (Manhattan); New York State National Organization for Women; New York State Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Heath; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin, Bill Baird, Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan and Pro Choice Coalition. The Respondents were each plaintiffs in the district court and appellees in the court of appeals.

An Intervenor in the district court was the Respondent City of New York, which pressed a state law public nuisance claim. The City of New York did not seek contempt citations against

either the defendants or non-party Petitioners in the proceedings at issue in the courts below.

Non-Petitioners E.O.R.N. and Operation Rescue are not a corporations under Rule 28.1 of the Rules of this Court.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991
NO. ____

Florence Talluto, et al.,

Petitioners

v.

Planned Parenthood Margaret Sanger Clinic (Manhattan), et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DECISIONS BELOW

The two decisions of the district court resulting in two contempt judgments (Appendix E: A-65 to A-67 and Appendix G: A-81 to A-82) are reported in *New York State Nat. Organization for Women v. Terry, 732 F. Supp. 400 (S.D.N.Y. 1990)* (Appendix D: A-13 to A-64) and an unreported oral bench ruling which incorporates the earlier ruling at 732 F. Supp. 400. (Appendix F: A-68 to A-80). The three underlying injunctive orders are included in the Appendices. (A-1 to A-12). The appeals from these judgments were consolidated in the court of

appeals and are presently *sub judice* with oral argument having taken place on May 20, 1991. The decision of the court of appeals has not yet been issued.

JURISDICTION

The judgments of the district court for the southern district of New York were entered on May 10, 1990 and November 8, 1990. The consolidated appeals involving the contempt fines is *sub judice* in the United States court of appeals for the second circuit. This Court has jurisdiction, under 28 U.S.C. section 1254(1) to review the judgments of the United States district court before the judgment of the court of appeals has been issued.

STATUTORY PROVISIONS

42 U.S.C. section 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purposes of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice

President, or as a Member of Congress of the United States or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section; if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

Petitioners are eight individuals opposed to abortion who, though not parties to injunctions issued by the district court below, were nevertheless made subject to severe and coercive civil contempt fines totalling $300,000.00 for alleged violations of the injunctions.[1]

These phenomenally large fines levied against anti-establishment political protesters, for their participation in anti-abortion rescue demonstrations which have been found by the

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[1] The district court issued three injunctions upon which the contempt fines and penalties are based: a temporary restraining order dated May 5, 1988 (Appendix A: A-1 to A-4), a preliminary injunction dated October 27, 1988 (Appendix B: A-5 to A-8) and a permanent injunction dated January 10, 1989 (Appendix C: A-9 to A-12).

second circuit to be "a form of political speech,"[2] are reminiscent of Bull Connor and the Jim Crow South.

Respondents have asserted two federal causes of action: First, a conspiracy to violate a right to travel under 42 U.S.C. section 1985(3); and second, a conspiracy to violate a privacy right to abortion, also under Section 1985(3). Respondents also asserted various pendant state causes of action including trespass. Intervenor Respondent City of New York asserted a public nuisance claim under state law and no federal claim. Federal jurisdiction in the district court was invoked under 28 U.S.C. sections 1331 and 1343.

A. Course of Proceedings

The district court had earlier issued a permanent injunction (A-9 to A-12) in this action.[3] Subsequently, the private Respondents brought orders to show cause for summary judgment of contempt against the defendants and various non-party Petitioners for participating in Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13,

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[2] *New York State Nat. Org. for Women v. Terry*, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert denied*, ___ U.S. ___, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990).

[3] *New York State Nat. Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (granting a permanent injunction prohibiting the blocking of access to facilities that perform abortion), which was affirmed by the United States court of appeals for the second circuit in an opinion dated September 20, 1989; *New York State Nat. Org. for Women v. Terry*, 886 F. 2d 1339 (2d Cir. 1989) *cert. denied*, ___ U.S. ___, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) (affirming the district court's various underlying injunctive orders in the original action as modified to provide that previous contempt fines against plaintiffs Terry and Operation Rescue were to be paid into the court, not to the plaintiff National Organization for Women).

1989 and January 14, 1989 in violation of the temporary restraining order, preliminary injunction and permanent injunction.

The district court adjudged the Petitioners in contempt of its orders and levied alleged civil contempt fines totalling $300,000. The appeal of these huge fines was argued before the court of appeals for the second circuit on May 20, 1991, and no decision has yet been issued.

It is normal to wait until the court of appeals issues a decision before seeking a writ of certiorari from this Court. However, there is pending before this Court the case of *Bray v. Alexandria Women's Health Clinic*, No. 90-985, *infra*, which presents identical subject matter questions in the same context. This case should, therefore, be reviewed contemporaneously with *Bray*, or at least held for disposition pending decision in *Bray*. By granting the writ now, this Court will gain the benefit of the record and disposition of a nearly identical case as it considers the issues presented in *Bray*. Moreover, Petitioners will be afforded the opportunity to present their views on the issues before they are finally decided by this Court in *Bray*. The grant of a writ prior to disposition by the court of appeals is further suggested by the seriousness of the judgments at bar, i.e., for $300,000.00 in unconditional coercive civil contempt fines against eight individuals and the attendant chilling effect and mental anguish over potential collection actions.

Question 4 of the *Bray* Petition for Certiorari states: "Are Respondents' claims under 42 U.S.C. Section 1985(3) so insubstantial as to deprive the federal courts of subject-matter jurisdiction?". The 1985(3) claim is patently implausible and does not provide subject matter jurisdiction to the district court, thus depriving the district court of its ability to enforce wrongfully issued orders by civil contempt. *U.S. Catholic*

Conf. v. Abortion Rights, 487 U.S. 72, 101 L.Ed. 2d 69 (1988). See discussion *infra*.

The wholly intemperate nature of the massive contempt fines is highlighted by the $50,000 assessed against Florence Talluto, the first named Petitioner, for her political participation in two Operation Rescue anti-abortion demonstrations involving rescue blockades of abortion clinics. She is a 58 year old widow and grandmother and has been a pregnancy counselor since 1974. Her life savings consists of the remainder of the life insurance proceeds of her deceased husband and her home. She is employed as a secretary of Assumption of the Blessed Virgin Mary Roman Catholic Church in Centereach, (Long Island) New York. For participating in two Operation Rescue sponsored political demonstrations against abortion on October 29, 1988 and January 14, 1989, she was "adjudged in civil contempt and assessed coercive civil penalties in the amount of $50,000 [payable to the United States]. . . ", 732 F.Supp. at 406 (A-45 to A-46). Without this Court's aid, the federal courts, despite lacking subject-matter jurisdiction, will be responsible for impoverishing her in her twilight years. Other Petitioners include a priest, Reverend Robert Pearson, who was assessed $25,000 for one anti abortion protest and a minister, Reverend Jesse Lee, who was assessed a total of $100,000 for three demonstrations.

B. Statement of Facts

The Petitioners in this case were non-parties that the district court held in civil contempt of court and assessed $300,000 in contempt fines against them payable to the United States. *See*, Judgments at Appendices E, G (A-65 to A-67 and A-81 to A-82).

The district court acknowledged that the Petitioners had attacked the underlying orders of injunctive relief in the

contempt proceeding for lack of subject matter jurisdiction. 732 F. Supp at 400. (A-31). This attack was rejected out of hand by the district court which relied upon the earlier second circuit decision in *New York Nat. Org. for Women v. Terry, supra*, 732 F. Supp. at 400 (A-41 to A-42).

The district court found that the demonstrations in which the Petitioners participated had been organized by defendant Operation Rescue so that "protestors each day would converge on a facility where abortions were performed in an effort to close down the facility [and] . . . their purpose was to block the doors so they cannot do abortions today". 732 F.Supp at 393 (A-16), 405 (A-44).

In the earlier second circuit opinion, the circuit court recognized that the "defendants' actions clearly are a form of political speech protected by the First Amendment." 886 F.2d at 1363. The second circuit clearly acknowledged that the purpose of Operation Rescue demonstrations was to communicate the message "that abortion is wrong, immoral and must be stopped." 886 F. 2d at 1363.

As the United States has said in its Amicus Curiae Brief in Support of Petitioners' in *Bray* at p. 2-3:

> Petitioner Operation Rescue is an unincorporated association *with the principal goals of preventing abortions and ending the legalization of abortions*. Operation Rescue seeks to achieve these goals by, among other means, conducting "rescue" demonstrations at abortion clinics. . . During "rescue" demonstrations, petitioners obstruct the entrances to and exits from an abortion clinic, thereby effectively closing the clinic temporarily, preventing abortions from being performed for that period, and "rescuing"

> the fetuses that would otherwise have been aborted. Pet. App. 19a. The purpose of these demonstrations, as described in Operation Rescue's literature, is to "intervene between abortionists and the innocent victims," by "*physically* blockading abortion mills with [human] bodies." *Id.* at 20a (quoting *Operation Rescue, National Day of Rescue - October 29, 1988 (1988)*. During such a demonstration, no person - male or female - is allowed by the demonstrators to enter the clinic. (emphasis added).

For participation in one or more Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in the New York City area, the district court levied what it termed coercive civil contempt penalties and fines against the political protestors as follows:

Petitioner	TRO, Prel. or Perm. Injunction Violations	Unconditional Fines*
Florence Talluto	2	$ 50,000
Rev. Jesse Lee	4	$100,000
Joseph Foreman	2	$ 25,000
Michael McMonagle	1	$ 25,000
Jeff White	1	$ 25,000
Michael LaPenna	2	$ 25,000
Rev. Robert Pearson	1	$ 25,000
Christopher Slattery	2	$ 25,000

* 732 F.Supp. at 413-414 (A-62 to A-63)

It is these phenomenally large contempt penalties that the Petitioners seek to have vacated by this Court.

REASONS FOR GRANTING THE WRIT

I. The underlying injunctive orders of the district court enforced by purportedly civil contempt fines and penalties rest on the identical legal grounds at issue in a case presently before this Court, *Jane Bray et al. v. Alexandria Women's Health Clinic, et al.*, No. 90-985.

1. Federal Jurisdiction

This Court has under present consideration the exact legal issues which the Petitioners raise in *Bray v. Alexandria Women's Health Clinic, cert. granted*, ____ U.S. ____, 111 S. Ct. 1070, 112 L.Ed. 2d 1176 (1991) (No. 90-985), which is presently pending.

The questions presented in the *Bray* Petition for Certiorari included as Question No. 4: "Are respondents' claims under *42 U.S.C. Section 1985(3)* so insubstantial as to deprive the federal courts of subject matter jurisdiction?" *Bray Pet. Cert.* at p(i).

The "Questions Presented" section of this Petition contains the identical first four questions presented in the *Bray* case. In view of the excessive monetary penalties assessed against the Petitioners, this Court should *either grant* and consider it with *Bray or hold* this Petition pending this Court's decision in *Bray*. If this Court answers this fourth question in the affirmative, as the *Bray* Petitioners urge, then this Court can, without more, *either vacate and reverse* in their entirety the allegedly civil contempt judgments, fines and penalties assessed against the Petitioners in the case at bar *or vacate and remand* for further proceedings consistent with the *Bray* decision. As

this Court has said in *United States v. United Mine Workers, 330 U.S. 258, 195 (1947)*:

> The right to remedial relief falls with an injunction which events prove was erroneously issued . . . and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court. . . If the Norris-LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety. . . Assuming, then, that the Norris-LaGuardia Act applied to this case and prohibited injunctive relief at the request of the United States, we would set aside the preliminary injunction of December 4 and the judgment for civil contempt . . . (citations omitted).

This principle of allowing a non-party to defend a civil contempt citation by attacking the subject matter jurisdiction of the lower court to issue the order was recently affirmed in *U.S. Catholic Conf. v. Abortion Rights*, 487 U.S. 72, 101 L.Ed. 2d 69 (1988). In that case, the U.S. Catholic Conference of Bishops, a non-party, was held in civil contempt and fined $50,000 per day for disobeying a subpoena duces tecum to produce documents. The Catholic Bishops unsuccessfully challenged the subject matter jurisdiction of the district court. The court of appeals limited the Bishops defense of the civil contempt citation to the argument that "the district court lacked even colorable jurisdiction to hear the suit." 487 U.S. at 80. This Court reversed, holding that:

> When a district court elects to apply civil contempt to enforce compliance, it is consistent with that approach to allow full consideration of the court's subject-matter jurisdiction . . . Accordingly, on remand, the Court of Appeals

> must determine whether the District Court had subject-matter jurisdiction in the underlying action. If not, then the subpoenas duces tecum are void, and the civil contempt citation must be reversed "in its entirety." *Mine Workers, supra*, at 295, 91 L.Ed. 884, 67 S.Ct. 677. (487 U.S. at 79-80).

This Court by Mr. Justice Kennedy forcefully stated:

> The right of a nonparty to appeal an adjudication of contempt cannot be questioned. . . Once the right to appeal a civil contempt order is acknowledged, arguments in its legitimate support should not be so confined that the power of the issuing court remains untested. . . The challenge in this case goes to the subject-matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority. (487 U.S. at 76-77).

If the Petitioners in the case at bar and the *Levy* Petitioners are correct that the highly attenuated Ku Klux Klan Act claim of Respondents is insubstantial in a jurisdictional sense, then the civil contempt judgments with their fines and penalties "must be reversed in its entirety." *Catholic Conference*, 487 U.S. at 80. (quoting *United States v. United Mine Workers*).

2. The Right to Interstate Travel

The most patently insubstantial aspect of the Respondents' purported federal claim under 42 U.S.C. Section 1985(3)[4] is the application of the right to interstate travel to Petitioners' anti-abortion demonstration activities. *See generally* Brief Amici Curiae of Daniel Berrigan, S.J. et al. in the *Bray* case (containing thorough analysis of Supreme Court decisions on the right to travel and concluding that the claims are jurisdictionally insubstantial as foreclosed by the prior decisions of this Court). As a threshold matter, there is no right to travel case factually analogous to rescue demonstrations of the type involved in this case. Such decisions involve infringement of the right to travel by state action, principally through discriminatory residency requirements.[5] The right to travel in its classic meaning ensures new residents the same right to *vital governmental benefits and privileges* in the states to which they

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[4] A *prima facie* case for relief under 42 U.S.C. Section 1985(3) must consist of alleging at least four necessary elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; (3) an act of furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Broth. of Carpenters and Joiners, Local 610 v. Scott, 463 U.S. 825, 828-29 (1983) (restating the test first formulated in *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971).

[5] *See e.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

migrate as they are enjoyed by other residents. *Califano v. Gautier Torres*, 435 U.S. 1 (1978).

In analyzing rescue demonstrations, United States District Judge A. Wallace Tashima has commented: "Whatever other legal rights and liabilities may be implicated by such conduct, there in no federal privilege or immunity of one class of persons not to have another class of persons engage in non-violent, civil disobedience."[6]

As the *Bray* Petitioners assert in their Main Brief at p. 25-26:

> The implications of the holding of the court of appeals are astounding. Virtually every business located in a city situated near a state border (e.g., New York, Philadelphia, Washington, D.C., Chicago, Portland, St. Louis, Minneapolis, and so forth), as well as every business located on a major interstate route or in the vicinity of a tourist site or commercial center, will serve numerous out-of-state customers on a regular basis. According to the holding of the court below, any sit-in or mass picketing at such a business would be a federal constitutional violation. . . This Court has never recognized a constitutional right to travel of such all-encompassing scope. . . The right to travel, however, is not an unlimited right to mere physical movement. . . . There is no general federal constitutional tort of obstruction of public or private passage.

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[6] *National Abortion Federation v. Operation Rescue*, No. CV- 89-1181 (AWT) slip op. at 7 (C.D. Cal. January 31, 1990)(dismissing amended complaint with prejudice).

See, Brief Amicus Curiae of United States in the *Bray* case at Section II. The right to interstate travel is not implicated where the Petitioners rescue demonstrations have only a *mere incidental effect upon travel.*

The application of the right to interstate travel to suppress traditional non-violent civil disobedience is nothing short of constitutional ambrosia - the creation of a federal cause of action where none exists.

3. Class Animus

In the court below, the class-based animus requirement was premised upon a subset of gender: women seeking abortions. In rejecting this notion, United States District Judge A. Wallace Tashima has cogently explained why this same class of "women seeking abortions" is not a class intended to be protected by the Ku Klux Klan Act[7]:

> The Court disagrees with the proposition that any "particular [sub]class of women," *id.*, is a protected class. For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, it separates persons of the same gender from each other and, obviously, on a basis other than by gender. *The inquiry*, thus, *must be made without respect to gender, i.e.*, it is the *"seeking abortion" trait which animates the defendants' actions* and must be the basis for making the . . . [Section 1985(3)] analysis. (emphasis added).

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[7] *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168, 1170 (C.D. Cal. 1989).

As the United States argues in its *Bray* Amicus Curiae Brief at 15:

> Just as there is no gender-specific position concerning other moral questions, so, too, there is no specifically "male" or "female" point of view with respect to abortion. . . Respondents also overlook that a substantial number of women oppose abortion. That fact distinguishes this case from *Griffin v. Breckenridge*, in which there was no suggestion that a substantial number of blacks opposed granting blacks the right to vote. In other words, petitioners' anti-abortion demonstrations are not a form of gender based discrimination because they are aimed at a *practice*, not a type of *person*.

According to the Respondents, early American feminists, many of whom adamantly opposed abortion as the "murder of the innocents" would possess the requisite gender based animus for purposes of 42 U.S.C. Section 1985(3). *See generally*, Brief of Feminists for Life in America, et al, as Amici Curiae in the *Bray* case.

The presence of Petitioner Florence Talluto manifests the semantic gymnastics involved in holding that participation in anti-abortion blockades and demonstrations have at their root a class-based invidiously discriminatory animus by women against other women.

CONCLUSION

For the foregoing reasons and those of the *Bray* Petitioners and their Amici Curiae supporters, the Petitioners pray that this Petition be granted and that the contempt judgments assessing $300,000 in fines against the non-party

Petitioners be *either vacated and reversed* in their entirety *or vacated and remanded* for further proceedings consistent with this Court's decision in *Bray*.

Respectfully submitted,

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APPENDIX E

United States Court of Appeals
FOR THE SECOND CIRCUIT

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; NEW YORK CITY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN; NATIONAL ORGANIZATION FOR WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS - NEW YORK METROPOLITAN AREA; NEW YORK STATE NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC.; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; EASTERN WOMEN'S CENTER, INC.; PLANNED PARENTHOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC (BROOKLYN); PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUFFOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR; RABBI DENNIS MATH; REVEREND DONALD MORLAND; PRO CHOICE COALITION,
Plaintiffs-Appellees.

CITY OF NEW YORK,
Plaintiff-Intervenor-Appellee,
-v-

RANDALL TERRY, OPERATION RESCUE, REV. JAMES P. LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE DOES,
Defendants-Appellants.

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PRELIMINARY STATEMENT

On January 31, 1989, Defendants filed their notice of appeal from the orders entered by the United States District Court for the Southern District of New York, Hon. Robert J. Ward, U.S.D.J., (1) denying Defendants' motion under Fed.R.Civ.P. 12(b)(1) and 12(b)(6) to dismiss Plaintiffs' Amended Complaint and Plaintiff-Intervenor City of New York's complaint and granting Plaintiffs' and the City's Cross-Motion for Summary Judgment; and (2) granting permanent injunctive relief to Plaintiffs and the City (App. 787-789).[1] On the afternoon of February 9, 1989, Defendants' counsel were informed by Staff Counsel that Appellants' Brief and Supplemental Appendix on this appeal would have to be filed on the following Tuesday, February 14, 1989. No explanation was offered by Staff Counsel for this extraordinarily short briefing schedule, the announcement of which left Defendants without even enough time to safely file a motion for an extension of time, lest they lose their right to appeal from the final judgment against them. To the extent that Defendants have therefore been compelled to file less than a complete and well-reasoned [2] brief on the merits, we respectfully submit that defendants have been denied due process on this appeal.

Since this brief is supplemental in nature, all of the factual and legal issues and arguments that were briefed in Defendants-Appellants main brief of January 20, 1989, are incorporated by reference as if fully set forth herein to be applied against the summary judgment ruling and the

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[1] References to "App. ___" with pages numbered after 736 refer to the Supplemental Appendix filed by defendants-appellants herewith, which is numbered to run consecutively from the last page of Appellants' Appendix.

permanent injunction with its $25,000/day doubling fines. All of those factual and legal positions taken against the District Court's injunctions of May 5, 1988 and October 27, 1988, and the contempt fines are a fortiori applicable against the permanent injunction, i.e. standing, lack of irreparable harm, adequate remedy at law, lack of class certification, and the First Amendment. This brief will therefore not unnecessarily engage in redundant points. The District Court's Summary Judgment Memorandum is available in Lexis and Westlaw and will be published, but a West citation is not yet available.

STATEMENT OF THE CASE

Plaintiffs commenced this action in Supreme Court, New York County, on April 25, 1988, seeking to enjoin Defendants' planned demonstrations to be carried out in the New York City area from April 30 until May 7, 1988. The previously [3] announced planned demonstrations for that week, consisted of picketing, singing, praying, chanting, holding placards, signs, and wearing armbands, and many of the protestors sat down in front of the abortion clinic, on the sidewalk, partially or fully blocking ingress and egress to an undisclosed abortion facility each day, in order to prevent abortions from being performed on that particular day.

In their complaint, Plaintiffs sought a preliminary and permanent injunction enjoining Defendants, from April 30 until May 7, 1988, or for the duration of the planned Operation Rescue, whichever was later, from obstructing access to any facility at which abortions are performed in New York City and the surrounding counties.

On May 5, 1988, the District Court granted complete injunctive relief to plaintiffs by continuing the Order signed

by Justice Cahn of Supreme Court, New York County and adding monetary sanctions of $25,000/day. Justice Ward's Order covered the period from May 2, 1988 to May 7, 1988, the full period for which plaintiffs' complaint had sought injunctive relief. The planned demonstrations actually ended earlier, on May 6, 1988.

[4] On October 26, 1988, Defendants filed their Rule 12 motion to dismiss Plaintiffs' Amended Complaint and the City's untimely Complaint. Plaintiffs and the City sought and were granted a substantial extension of time to respond to the motion.

On October 27, 1988, the District Court again granted further injunctive relief to plaintiffs, by modification and restatement of the court's May 5th injunction, which had previously expired by its terms, to cover the period from October 28, 1988 to October 31, 1988. Plaintiffs did not move to amend their complaint in order to add this request for relief to their pleading.

On the same day, the District Court issued an Opinion and Order determining the merits of the controversy between the parties relying upon undisputed facts and certain inferences from said facts. Based upon said Opinion and Order, Plaintiffs submitted a Judgment for $50,000, which was entered on November 4, 1988 and the City submitted a Judgment for $19,141, which was entered on December 9, 1988.

Defendants filed a Notice of Appeal from the November 4th Judgment on November 15, 1988 and a further Notice of Appeal from the December 9, 1988 Judgment on December 20, 1988.

[5] More than thirty days after Defendants' November 15th

Notice of Appeal from the $50,000 Judgment in favor of Plaintiffs, Plaintiffs on December 21, 1988, served a so-called motion for summary judgment. This motion was also denominated an Opposition to Defendants' second motion to dismiss the complaint, although Plaintiffs recognized and relied on the court's earlier adjudication of Defendants' first motion to dismiss and argued that it was controlling. A preliminary injunction of the newly-announced Operation Rescue demonstration for mid-January, 1989 was requested as alternative relief, if the so-called motion for summary judgment was not granted.

Defendants, by letter of December 28, 1988 requested an adjournment of the so-called motion for summary judgment and suggested, pursuant to Rule 12(h), that the District Court lacked subject matter jurisdiction to hear the motion since the case was on appeal in this Court.

On December 29, 1988, at approximately 4 P.M., the record in this action was certified by the Clerk of the District Court and filed with the Clerk of this Court with the lead docket number of 88-7873.

On December 30, 1988, in a telephone conference, the Plaintiffs' counsel and the District Court were informed that **[6]** the record had been filed in the Court of Appeals on the previous day.

The parties appeared for argument on defendants' Rule 12 motion and Plaintiffs' Rule 56 motion on January 6, 1989 (App. 737-786). At the close of the argument the District Court reserved decision on the several motions. (App. 786) Four days later the District court entered an order denying Defendants' motion to dismiss and granting summary judgment to Plaintiffs and the City (App. 488) and entered a permanent injunction (App. 489-491). The

District Court's opinion on the motions was issued on January 18, 1989 (App. 492-529). The instant appeal followed.

STATEMENT OF THE ISSUES

I. Did the District Court have jurisdiction to grant summary judgment to Plaintiffs and the City while four appeals were pending in this Court?

II. Did the District Court err in failing to dismiss the Plaintiffs' Amended Complaint and the City's Complaint for failure to state a claim?

III. Did the District Court's entry of permanent injunction violate Defendants' (and other citizens') First Amendment Rights?

[7] IV. Did the District Court err in granting Plaintiffs and the City summary judgment on their Complaints where Defendants had been completely denied discovery and had raised material issues of disputed fact?

V. Is the District Court's permanent injunction which purports to restrain non-parties in the exercise of their First Amendment Rights on public sidewalks an unreasonable restriction in time, place, manner and content in violation of the Constitution?

VI. Did the District Court err in granting permanent injunctive relief to a class of plaintiffs without any discovery, hearing or certification of a class under Fed.R.Civ.P. 23?

VII. Did the District Court err in granting permanent injunctive relief to Plaintiffs and the City that

lack standing to assert the claims alleged?

STATEMENT OF FACTS[2]

Part of the submissions in support of the Plaintiffs' summary judgment motion was two highly politically charged **[8]** affidavits of two presidents of the lead Plaintiff political organizations: New York State National Organization for Women and New York City National Organization for Women. (App. 640-653).

As part of a pattern of submissions in this case, the Plaintiffs "prove" their facts by incompetent newspaper reports. This unacceptable manner of proof forms the basis of much of the District Court's "factual" predicate in this case.

The Defendants submitted affidavits by two Rescue demonstrators, which belie any charge of violence by the plaintiffs (App. 794-800). The Rescue demonstrators were, in fact, peaceful, prayerful and non-violent.

In the Defendants opposition papers, an affidavit of co-counsel Joseph P. Secola stated that the Defendants had been precluded from any discovery by the District Court, including critical factual issues of injury and maternal health (App. 802-803, par. 4-7). Argument was made regarding the Defendants' Fed. R. Civ. P. 56(f) request; this request was ultimately rejected as the District Court granted summary judgment to the Plaintiffs and Plaintiff-Intervenor, which involved factual determinations of injury and maternal health. (App. 756-757, 773-778)

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[2] This section is a continuation of the Statement of Facts in the main brief.

[9] The documents referred to by Defendants involving Roe v. Operation Rescue, No. 88-5157 (E.D.Pa. 1988) were submitted to the District Court. Certain documents, Court rulings and transcripts of another similar case in Boston, Planned Parenthood, et al. v. Operation Rescue, et al., No. 88-2329-MA, which were not submitted to the District Court because of unavailability, are included in the appendix as persuasive authority for this Court to consider.[3]

[10] ARGUMENT

I.

The District Court Lacked Subject Matter Jurisdiction To Grant Plaintiffs Summary Judgment And Enter A Permanent Injunction

As set forth in the Statement of the Case, supra, on December 29, 1988 the Record in this action was certified by the Clerk of the United States District Court for the Southern District of New York and filed with the Clerk of the United States Court of Appeals for the Second Circuit in connection with the then pending four appeals assigned Docket Nos. 88-7873, 88-7915, 88-7969 and 88-9103.

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[3] Documents submitted to District Court at October 25, 1988 hearing: App. 664-668, Order of First Circuit of Appeals affirming denial of TRO by District Court and District Court's first bench ruling (Tauro, U.S.D.J.). Documents not submitted to District Court: Transcript of hearing preceding District Court's first bench ruling (App. 839-897); Motions, affidavits, and Order Endorsement "Denied" regarding plaintiffs renewed motion for injunctive relief (A. David Mazzone, U.S.D.J.) (App. 669-683); Second Transcript referred to in denial of plaintiffs' renewed motions (App. 669, 898-937.)

These appeals are from (1) an order granting plaintiffs preliminary injunctive relief, (2) a final order and judgment holding Defendants Terry and "Operation Rescue" in contempt and fining them $50,000; (3) a final order and judgment holding Defendants Terry and "Operation Rescue" jointly and severally liable to pay $19,141 in police overtime costs to the City of New York and (4) a final order and judgment jointly and severally against Defendants Terry and "Operation Rescue" and their counsel for fees and expenses under Fed. R. Civ. P. 37(a)(4).

[11] When the record was filed in this Court, the District Court was deprived of jurisdiction to take any action that substantially altered the status quo in the action as it then stood. Ryan v. United States Lines, 303 F.2d 430, 433-34 (2d Cir. 1962); Armstrong v. Board of Supervisors, 616 F.2d 305, 327 (7th Cir. 1980); Johnson v. Scully, 563 F. Supp. 851, 877 (E.D.N.Y. 1983), rev'd on other grounds, 727 F.2d 222 (2d Cir. 1984). Although the Defendants invoked the District Court's lack of subject matter jurisdiction, as the District Court acknowledged (App. 503, 505), the Court determined that it had jurisdiction to render a decision on the merits of Plaintiff's and the City's claims and grant final and permanent relief thereunder (App. 507). This result depended upon an impermissible reading of the relief sought in the complaints and ignored the fact that three appeals were pending from judgments unquestionably final in nature.[4]

When the court granted Plaintiffs' and the City's motion for summary judgment, it recast its earlier Opinion

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[4] For example, it is clear that the judgment against Defendants' counsel is a final judgment and appealable as such by the affected counsel. Reygo Pacific Corp. v. Johnston Pump Co., 680 F.2d 647, 648-649 (9th Cir. 1982).

multiple theories and case authorities advanced in the motion. It is [12] precisely this change in the posture of the record on appeal which is prohibited by Rule 4 of the Federal Rules of Appellate Procedure, even in the case of appeals from non-final orders. See International Association of Machinists & Aerospace Workers v. Eastern Airlines, Inc., 847 F.2d 1014, 1017-1018 (2d Cir. 1988); State of New York v. Nuclear Regulatory Commission, 550 F.2d 745, 758-59 (2d Cir. 1977); Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623, 625 (2d Cir. 1962); Landman v. Mitchell, 445 F.2d 274, 275 (5th Cir. 1971), cert. denied, 404 U.S. 1022 (1972).

II.

Granting Permanent Injunctive Relief To A Class Never Certified, Violated Rule 23

In its January 18, 1989 decision, the District Court concedes that "[t]o date, the court has taken no action to certify the putative class" (App. 496). However, on January 10, 1989 the Court issued a permanent injunction that applies by its express terms to "any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester counties" (App. 489-490). While the District Court had previously justified its failure to certify the class before granting temporary and preliminary injunctions on the ground of the alleged lack of time to address the appropriateness of [13] class treatment in advance of planned demonstrations (e.g., App. 474),[5] no such claimed "emergency" can even be offered to support the awarding of a permanent injunction to a still uncertified class. The authorities discussed at pages 43-45 of Defendants' Main Brief apply a fortiori to the January 10, 1989 permanent injunction.

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[5] The court never addressed the fact that the continual time pressure was a function of when Plaintiffs sought to invoke the court's equitable powers.

III.

The Court Erred In Granting Summary Judgment To Plaintiffs

Fed. R. Civ. P. 56(c) provides that summary judgment is appropriate,

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Here there were no depositions or answers to interrogatories, because Defendants were never permitted to take any discovery of Plaintiffs on their claims (App. 802-803, 756-757, 773-778) although they made a Fed. R. Civ. P. 56(f) request. Moreover, Defendants' opposing affidavits demonstrated that there were **[14]** material issues of fact on which discovery was necessary (see, e.g., App. 794-800). Finally, not only were Plaintiffs not entitled to judgment as a matter of law, but their pleadings should have been dismissed.

A. Plaintiffs Failed To Plead Or Prove A Claim Under Section 1985(3)

1. State Involvement.

The District Court herein found that to satisfy the claim that Defendants had conspired to deny Plaintiffs' Right to Privacy (abortion) under 42 U.S.C. Section 1985(3), there must be a showing of "state involvement." Subsumed in

this holding, is the fact that the Right of Privacy (abortion) is only constitutionally protected against government or state infringement, not private action. See Appellants Appeal Brief, p. 66.

The District Court opinion concludes that Rescue demonstrations have rendered "police officials incapable of securing women who choose abortion equal access to medical treatment," thus satisfying Section 1985(3)'s requirement for "state involvement." (App. 519-20) Overlooking a line of Supreme Court holdings concerning state action requirements, the Court supports its conclusion with dictum from Justice [15]Steven's concurring opinion in Great Am. Fed. Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 384 (1979) (Stevens, J., concurring):

> [I]f private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment; the private persons would then have violated § 1985(3).

In the paragraph immediately following the foregoing quotation, however, Justice Stevens describes the requisite nature of state action contemplated:

> If, however, private persons engage in purely private acts of discrimination -- for example, if they discriminate against women or against lawyers with a criminal practice, [citation omitted] -- they do not violate the Equal Protection Clause of the Fourteenth Amendment. The rights secured by the Equal Protection and Due Process Clause of the Fourteenth Amendment are rights to protection

> against unequal or unfair treatment by the State not by private parties). Thus, while §1985(3) does not require that a defendant act under color of state law, there still can be no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the State. The requirement of state action in this context is no more than a requirement that there be a constitutional violation.

442 U.S. 384-85 (emphasis added).

[16] Thus, in the Supreme Court's recent holding regarding state action in an alleged trade union conspiracy to deny First Amendment rights, the majority opinion similarly concluded that:

> [A]n alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State.

United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825, 830 (1983) (emphasis added).[6] With respect to the foregoing requirements, applied to the case at hand, it is clear from the record that there are no allegations and no evidence of any kind that the State was involved in any alleged conspiracy, or that the aim of the alleged conspiracy

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[6] In its opinion, the Court cites United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. at 840 n.2. as supportive of its holding, without noting its source as Blackmun, J., (dissenting) (App. 520).

was to influence State activity. Indeed, the Defendants' manifest purpose has been to directly intervene through Rescue demonstrations to save unborn human life.

It is accordingly evident, that the District Court's holding in this respect is erroneous. The Court's opinion that the police's alleged inability to secure "equal access" to [17] abortions for women constitutes "state involvement" for purposes of Section 1985(3), is in fact, analogous to the dissent's argument in Carpenters, that the State's failure to enforce or threatened failure to enforce the law is enough to trigger Section 1985(3). United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825, 851 (Blackmun, J., dissenting).

Beyond the Supreme Court's mandated "state action" requirements in the Carpenters decision, are earlier holdings, where the Court broadly describes the benchmarks of state involvement. In Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), dealing with a private power company, closely regulated by the State, it was said: "But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." (emphasis added) And in Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), citing the earlier decision of Shelley v. Kraemer, 334 U.S. 1 (1948), the Court observed, "that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." (emphasis added) [18] In the later case of Flagg Bros. v. Brooks, 436 U.S. 149, 164-166 (1978), dealing with a due process, equal protection challenge to a state statute permitting private warehousemen to sell levied goods in place of the sheriff's department, it was held that mere

acquiescence on the part of the State to private activity does not convert that activity into State action.

In light of the foregoing discussion, it is clear that the District Court's finding of "state involvement" for purposes of Section 1985(3) herein, is plainly incorrect and should be reversed.

2. Class-Based Animus.

In its summary judgment opinion, the District Court held: "a conspiracy to deprive women seeking abortions of their rights guaranteed by law is actionable under section 1985(3)." (Emphasis added) (App. 516-517). The defendants assert this holding is an unwarranted extension of Section 1985(3).

The concept of animus is one of ill-will. It is undisputed that "Operation Rescue" demonstrators seek to intervene to protect (1) the unborn child from imminent violent death and (2) the mother from the harmful effects of abortion. Dr. O'Callaghan testified that nearly 50% of her counselees suffer from an emotional and psychological disorder denominated **[19]** post-abortion stress syndrome. (App. 230-286, 255-259) It is simply wrong to suggest that the Defendants or Operation Rescue demonstrators have any ill-will or invidious discrimination toward women. Despite the District Court's comparison of Rescue demonstrations with the activities of the Klu Klux Klan (App. 517 at N.13),[7] it is undisputed that all Operation Rescue

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[7] As the Fourth Circuit has stated, "The passage of the Klu Klux Klan Act was in response to widespread acts of violence and acts of terror directed at blacks and their supporters in the post-war South." Harrison v. KVAT Food Management, Inc., 766 F.2d

(continued...)

demonstrators are peaceful, prayerful and nonviolent. Demonstrators specifically must take a pledge of nonviolence, which is to be followed even if violence is committed against the demonstrators. (App. 606-607, 614-617, 794-800, 790-793)

The United States Supreme Court in United Broth. of Carpenters and Joiners v. Scott, 463 U.S. 825 (1983) specifically refused to affirm the Fifth Circuit Court of Appeals' holding that Section 1985(3) "reaches conspiracies other than those motivated by racial bias." Id. at 835.

[20] Even if gender bias is reachable, all women or women in general are not the appropriate class for the case at bar, despite the semantics of the District Court: a subgroup of women are -- pregnant women.

Pregnancy, however, is not an immutable characteristic common to all women at all times, as is race or gender. "The conspiracy, in other words, must aim at a deprivation of equal enjoyment of rights secured by the law to all." Scott at 835, quoting Griffin v. Breckenridge, 403 U.S. 88, 182 (1966) (emphasis added). See Doe v. Deane, 658 F.Supp. 216, 221-222 (W.D. Mich. 1987) (rejecting "surrogate mother" class); Harrison v. KVAT Food Management, Inc., 766 F.2d 155 (4th Cir. 1985) (limiting Section 1985(3) to racially-motivated bias); McLellan v.

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[7] (...continued)

155, 158 (4th Cir. 1985) (emphasis added); McLellan v. Mississippi Light & Power Co., 545 F.2d 919, 931 (5th Cir. 1977) ("the statute was enacted by a Congress predominantly concerned with the violent activity of a vindictive Klu Klux Klan") (emphasis added).

Violence, terror and vindictiveness are hardly an apt description of Operation Rescue demonstrations.

Mississippi Power & Light Co., 545 F.2d 919, 929 (5th Cir. 1977) (foreshadowed Scott's "close question" analysis concerning non-racial classes: "That concern dictates the exercise of restraint when a court is confronted with class-based discrimination grounded in a non-racial animus."); McLean v. International Harvester Co., 817 F. 2d. 1214, 1218-19 (5th Cir. 1987) (quoting McLellan at 928-929 regarding the exercise of restraint in recognizing non-racial class-based animus); Wilhelm v. Continental Title Co., 720 F.2d 1173, 1176-1177 (10th Cir. 1983), cert. denied, 104 S. Ct. 1601 [21] (1984) (Courts must give effect to the intent of the Congress of 1871, which was primarily interested in invidious racial discrimination); D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1485-1487 (7th Cir. 1985), (Scott requires caution beyond racial class).

The Defendants urge that this Court reject a class made of a subgrouping of gender: pregnant women. There is no factual basis for a finding that the Defendants or Rescue demonstrators have ill-will, animus or invidious discrimination against pregnant women.

3. The Right to Travel.

Relying on a holding for Doe v. Bolton 410 U.S. 179, 200 (1973), that State residency requirements for abortions are inconsistent with the Privileges and Immunities Clause of the Fourth Amendment, together with a brief reference to the right against private discrimination created by the Supreme Court in Griffin v. Breckenridge, 403 U.S. 88, 105-06 (1971), the District Court opinion concludes that the Defendants' sit-in demonstrations have denied the Plaintiffs' Constitutional Right to Travel. (App. 518-19).

As a threshold matter, no Right to Travel case factually analogous to Rescue demonstrations exists. The majority [22] of Court holdings deal with State infringement of the Right to Travel, principally through discriminatory residency requirements. See e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).[8]

In Griffin v. Brekenridge, supra, certain whites had forcibly stopped an automobile containing "Negro" citizens on a public highway. One of the Negroes, mistakenly believed to be a Civil Rights worker, was beaten with a club, while the others were allegedly threatened with death and injury and then beaten themselves. Under this factual situation, after detailed analysis of the legislative history of § 1985(3), the Supreme Court found that the Right to Travel was subject to "private" interference as well as "governmental," and thus actionable under § 1985(3).

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[8] See also Comment, The Right to Travel: In Search Of a Constitutional Source, 55 Neb. L. Rev. 117 (1975); Note, The Right to Travel--Quest for a Constitutional Source, 6 Rut. Cam. L.J. 122 (1974).

Griffin v. Breckenridge, 403 U.S. 88, 98-106. Reversing the Fifth Circuit's affirmation of the District Court dismissal, the Supreme Court observed that it was "open to the petitioners to prove at trial that they had been engaging in interstate travel or intended to do so, that their federal right to travel was one of the rights meant to be [23] discriminatorily impaired by the conspiracy. . ." Id. at 106.

The District Court's holding herein, that the Defendants have violated Plaintiffs' Right to Travel is incorrect and unsupported in fact and law. A brief review of the Plaintiffs' claim that "Defendants' actions in blockading clinics" are "indistinguishable" from "the actions alleged in Griffin",[9] shows it to be unsubstantiated nonsense:

> - Griffin involved the act of forcibly blocking travel on a State highway. Rescues occur on public sidewalks in the traditional manner of peaceful Civil Rights sit-in demonstrations.
>
> - Griffin involved detention, the brutal use of deadly force and immediate threats of death and serious injury to halt travel upon a highway. Rescues constitute passive, non-violent demonstrations to stop the act of abortion at clinics and have nothing to do with free travel on public highways or streets.
>
> - Griffin involved racially, class based animus, proscribed by law. Rescue involve the intent to

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[9] Memorandum of Law in Opposition To Defendants Motion to Dismiss and In Support of Plaintiffs' Motion For Summary Judgment, dated December 21, 1988 at 26.

> non-violently halt abortion to protect unborn human life and the mother, which has not been proscribed for purposes of Section 1985(3).
>
> - Griffin involved violent, racially based assaults interfering with highway travel and Civil Rights activity. Rescues, involve peaceful First Amendment activity such as display of placards, singing, chanting, counseling and praying, as well as passively blocking the entrance of abortion [24] facilities as a means of protesting and halting the termination of unborn human life.

With respect to the question of racial animus, as related to Section 1985(3) actions, the Court in Griffin noted that "the conduct here alleged lies so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statue if this does not." Id. at 103. In the later case of United Brotherhood of Carpenters and Joiners v. Scott 463 U.S. 825, 836, dealing with alleged "political" and "economic" animus, the Court noted:

> We are unpersuaded. In the first place, it is a close question whether §1985(3) was intended to reach any class based animus other than animus against Negroes and those who championed their cause, most notably Republicans. The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominate purpose of §1985(3) was to combat the prevalent animus against Negroes and their supporters.

Griffin, in applying the interstate Right to Travel to the

context of §1985(3), dealt directly with violent, purposeful racial animus. No such animus exists in fact or analogously in this case. Indeed, the intent or Rescue demonstrations is the emancipation of human life.

[25] The contention that non-violent sit-in demonstrations involving hundreds of volunteers of conscience, gathering to halt abortion, rises to a purposeful constitutional violation of the interstate Right to Travel, is nothing short of constitutional fiction--legal ambrosia--the quest for a Federal cause of action where none exists.

It is respectfully submitted, that the District Court's finding that Plaintiffs' Right to Travel has been violated should accordingly be reversed.

B. Plaintiffs Failed To Plead
Or Prove A Claim For Trespass

As the District Court itself pointed out (App. 521), "[t]respass is the interference with a person's right to possession of real property . . . ." However, there is no evidence that any participant during an "Operation Rescue" demonstration in the New York Metropolitan Area entered upon the private property of any named Plaintiff or any other person or entity. All of the demonstrations took place on the public sidewalk in front of abortion facilities. Cf. People v. Bush, 39 N.Y.2d 529, 349 N.E.2d 832, 384 N.Y.S.2d 733 (1976). This aspect of "Operation Rescue's" planned activities was publicly announced and known to Plaintiffs and the District Court. Therefore, there is simply no factual predicate to sustain a claim of trespass. (App. 780-781).

[26] Moreover, in order to enjoin trespasses in New York they must be "repeated or continuous." Lyons v.

Ball, 133 N.Y.S.2d 392, 393 (Sup. Ct. Westchester Co. 1954). The reason for such a rule underlies all exercises of the equity powers of the Court:

> A court of equity will not act in anticipation of possible future controversies, which may never take place. A temporary injunction is granted only when the rights of a plaintiff are being presently threatened so that irreparable injury will result unless prompt, immediate relief is granted.

Pratt v. LaGuardia, 47 N.Y.S.2d 359, 365 (Sup. Ct. New York County, 1944) (emphasis added).

The Amended Complaint failed to allege how a hypothetical trespass of limited duration could possibly cause an abortion clinic irreparable harm. The record is devoid of any evidence that the Defendants had either injured persons or property in the past or that they intended to do so in this case. Although the District Court referred to "[d]amages to the target facility and to the women who attempt to use the facility" (App. 521), there was no hearing at which evidence of any such damages was offered. To the extent that a demonstration caused a temporary loss of income to an abortion facility, there was certainly an adequate remedy at law in money damages. [27] Indeed, accepting the allegation in the Amended Complaint that abortions are ordinarily done by appointment (para. 40), Plaintiffs could not even argue that damages would be difficult to calculate.

Even before passage of the class action statute, New York courts have permitted class actions which sought as an exclusive remedy injunctive relief against an on-going nuisance which affected all members of the class. Greer v. Smith, 155 App. Div. 420, 140 N.Y.S. 43 (2d Dep't

1913). However, as stated by the court in Fisher v. Health Insurance Plan of Greater New York, 324 N.Y.S.2d 732, 736 (Sup. Ct. Kings Co. 1971):

> Separate wrongs to separate persons, though committed by similar means and pursuant to a single plan, do not alone create a common or general interest in those wronged . . . [citations omitted]. Class actions may not be maintained when the asserted wrongs are individual to the different persons and each aggrieved person may determine for himself the remedy he will seek and may be subject to a defense not available to others . . . .

There is no doubt that in the controversial area of abortion emotions may run high, but as Judge Newman said in Sierra Club v. Mason, 365 F. Supp. 47, 50 (D. Conn. 1973):

> Injunctions do not issue to avoid "temptation" toward some allegedly wrongful conduct, United Transportation Union v. State of Michigan Bar, [28]supra, 401 U.S. at 583 nor 'to soothe the anxieties of the parties'. Humble Oil & Refining Co. v. Harang, 262 F. Supp. 39, 42 (E.D. La. 1966).

Where on the other side of the equation, fundamental First Amendment rights of free speech, assembly and petition are involved, a court simply cannot constitutionally impose prior restraints on individuals who have eschewed violence, to "soothe the anxieties" of operators of income producing abortion clinics, which clearly have an adequate remedy at law.

C. The City Failed to Plead Or Prove A Claim For Public Nuisance

The District Court held that the City "has pleaded and proved all the elements of its public nuisance claim" (App. 523). There is simply no basis in the record for this finding.

A public nuisance is an offense to the public of a neighborhood or community in the enjoyment of its common rights, as distinguished from activity which results merely in injury even to large numbers of persons in the enjoyment of private rights, not shared by members of the community or neighborhood at large. See generally Copart Industries v. Consolidated Edison Co., 41 N.Y.2d 564, 394 N.Y.S.2d 169, 362 N.E.2d 968 (1977); State v. Wright Hepburn Webster Gallery [29] Ltd., 664 Misc. 2d 423, 314 N.Y.S.2d 661 (Supp. Ct. N.Y. Co. 1970), aff'd, 37 A.D.2d 698, 323 N.Y.S.2d 389 (1st Dep't 1971); 42 N.Y. Jur., Nuisances § 5, p. 449.

In the instant case, the City has not alleged that there has been any interference with or disruption of the rights of a neighborhood or community in the enjoyment of its common rights. Rather, the complaint merely alleges that the proposed activity by "Operation Rescue" participants will interfere with or otherwise prejudice the ability of some women to have abortions at the clinics targeted by "Operation Rescue."

The claimed rights of these women are clearly private rights and are not shared by members of the neighborhoods or communities at large where "Operation Rescue" intends to demonstrate. In other words, we do not have in this action as Plaintiffs a cross section of the affected

neighborhoods clamoring for a stop to "Operation Rescue's" activities.

The Court's assertion that Defendants "have interfered with the public's right to obtain medical services, and have injured the health of a considerable number of persons" (App. 523) is entirely unsupported. Plaintiffs did not offer the testimony of a single woman who claims to have been denied **[30]** an abortion as a result of an "Operation Rescue" demonstration, let alone that she sustained any injury to her health therefrom. No discovery was permitted to Defendants before the District Court granted the City's motion for summary judgment, and no factual showing of injury to any woman was made by the City on its public nuisance claim.

Moreover, even if a significant number of women were shown to have been affected, this is not material and does not render "Operation Rescue's" activity a public nuisance. People v. Brooklyn & Queens Transit Corp., 258 App. Div. 753, 15 N.Y.S.2d 295 (2d Dept. 1939), aff'd, 283 N.Y. 484, 28 N.E.2d 925 (1940); State v. Waterloo Stock Car Raceway, Inc., 96 Misc. 2d 350, 409 N.Y.S.2d 40 (Sup. Ct. Sececa Co. 1978). There was absolutely no colorable basis for the District Court's grant of summary judgment to the City.

IV.

FIRST AMENDMENT

The First Amendment arguments made in Defendants' main brief, are even more vital as applied to the permanent injunction. The permanent injunction dramatically escalates the $25,000/day fines by adding a doubling provision, which the Plaintiffs, and Plaintiff-Intervenor City sought.

(App. 491). The District Court's geometric increase of the already [31] phenomenally large $25,000/day fines was apparently done without hesitation, as the District Court had previously characterized the $50,000 unconditional contempt fine as being "modest by any standard". (App. 759).

The District Court has consistently failed, despite its shibboleths, to engage in any meaningful First Amendment analysis with regard to the Rescue demonstrations, branding all of the Defendants' as "outlaws" and the Rescue demonstrations and protest activities as unlawful "hit and run tactics." (App. 758-759, 768; But see, U.S.D.J. Tauro, App. 860-861: demonstrations are First Amendment expression; U.S.D.J. Mazzone, App. 933-937: demonstrations not a riot or uncontrolled or unmanageable conduct; U.S.D.J. Newcomer, App. 690: announcement of demonstrations not illegal conduct).

The Defendants continue to assert the defense of justification because of their common purpose in defending unborn children and mothers. (App. 790-793, 584-637; See comments of Pennsylvania Chief Justice Robert C. Nix, Jr., at App. 612) Compare Commonwealth v. Markum, 541 A.2d 347, 354-356 (dissenting opinion of Tamila, J.).

[32]

V.

STANDING

The District Court correctly recognized that when standing is interposed to defeat summary judgment, the Plaintiffs must go beyond their pleadings to offer competent proof. (App. 509). The District Court, without citation to authority, held that the fact that the abortion provider Plaintiffs were potential targets of the demonstrations

supplied the "concrete threat of injury". Without allowing discovery by Defendants or requiring proof, the District Court found standing. The District Court engaged in no analysis as to the other non-provider Plaintiffs, but did not dismiss them.

The Defendants again submit that the "concrete threat" is none other than the First Amendment protected announcement of the demonstrations. By engaging in free speech, the Defendants supposedly confer standing on all Plaintiffs. The Defendants submit that this holding and rationale is erroneous.

CONCLUSION

It is respectfully submitted that the judgments and orders appealed from should be reversed.

Dated: New York, New York
February 14, 1989

Respectfully submitted,

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